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No.

IN THE

Supreme Court of the United States

CITY OF MESA,

Petitioner,

v.

CRAIG W. PETERSEN,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Arizona Supreme Court correctly held, in conflict with the principles of this Court and decisions of several lower courts, that the Fourth Amendment to the United States Constitution prohibits random, suspicionless drug testing of firefighters absent evidence of prior drug abuse within the fire department?

PARTIES TO THE PROCEEDING

The parties to the proceedings before this Court are the City of Mesa, Arizona and Craig W. Petersen.

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On Petition for Writ of Certiorari to the Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner City of Mesa respectfully petitions for a Writ of Certiorari to review the judgment of the Arizona Supreme Court in this case.

OPINIONS AND JUDGMENT BELOW

The opinion of the Arizona Supreme Court is reported at 207 Ariz. 35, 83 P.3d 35 (2004), and is reprinted at Appendix (App.) 1a-17a. The opinion of the Arizona Court of Appeals is reported at 204 Ariz. 278, 63 P.3d 309 (App. 2003) and is reprinted at App. 18a-43a. The trial court's unreported decision is reprinted at App. 44a-54a.

JURISDICTION

The opinion of the Arizona Supreme Court was issued on January 27, 2004. On April 8, 2004, Associate Justice O'Connor extended the time to file this petition until May 26, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

STATEMENT OF THE CASE

This case raises an important, recurring question relating to a municipality's authority to randomly drug test employees holding safety-sensitive positions. Specifically, must a municipality wait until it can document a history of drug abuse or a history of drug-related accidents within its fire department before it can randomly drug test firefighters without violating the Fourth Amendment?

Mesa's Fire Department Substance Abuse Program requires employees in safety-sensitive positions to undergo random, suspicionless drug and alcohol testing.[1] It was implemented "to deter prohibited alcohol and controlled substance use and to detect prohibited use for the purpose of removing identified users from the safety-sensitive work force."[2] Mesa's policy designates firefighters, most of whom are licensed paramedics, as safety-sensitive professionals because they administer invasive medical treatment, drive emergency vehicles, and are called upon to perform dangerous rescues.

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[1] The City's policy also requires testing upon reasonable suspicion, post accident, and following an employee's return to duty. These portions of the policy were not challenged or discussed by the lower courts and, therefore, will not be discussed in this petition.

[2] Mesa Fire Department Substance Abuse Program Alcohol and Controlled Substance Testing Policy and Procedures, Oct. 2000. (Attached as Exhibit 1 to Mesa's Motion to Dismiss, filed August 24, 2001.)

Under the policy, a computer program randomly selects firefighters for drug testing. Firefighters are notified immediately before, during, or after work and, with allowance for travel time to the laboratory, are to be tested within thirty minutes of notification. They are permitted to use private bathroom stalls to provide urine samples, which are then inspected for proper color and temperature. The lab performs an immunoassay test that meets the requirements of the Department of Health and Human Services Mandatory Guidelines for Federal Workplace Drug Testing Program.[3] Samples are tested for the presence of marijuana, cocaine, opiates, amphetamines, and phencyclidine. All positive tests are confirmed with a gas chromatography/mass spectrometry test. Positive test results are provided to a Medical Review Officer, who has detailed knowledge of possible alternate medical explanations, and who reviews the results and confidentially consults with the employee before giving the results to the department's administrative official. All information, including positive tests, remains confidential and is not disclosed by the department without the firefighter's consent.

The respondent, a City of Mesa firefighter, challenged the City's random drug testing policy alleging that it violated his rights under Article II, Section 8 of the Arizona Constitution and the Fourth Amendment to the United States Constitution.

The trial court, utilizing the special needs balancing test established in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), found that the policy violated the Arizona Constitution. The court permanently enjoined Mesa from implementing the policy.[4]

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[3] 49 C.F.R. 40 (2003).

[4] The trial court did not discuss whether the policy was permissible under the U.S. Constitution. (App. 44a-54a.)

Reversing the trial court, the court of appeals found that the City's interest in protecting the public from firefighters who may be under the influence of drugs or alcohol outweighs the firefighters' individual privacy rights. In evaluating the government interest, the court stated:

> Firefighters must be mentally alert at all times in order to instantly respond to a crisis and grasp and follow orders, particularly when a split-second decision or error in judgment may prove fatal; they also must be physically fit in order to perform under the extremely demanding and dangerous conditions that jeopardize their own lives, the lives of their co-workers, and the lives and property of the public . . . . Given the daunting responsibilities they must shoulder on a moment's notice, firefighters expect, and necessarily accede to, more governmental regulation than most workers. Because the trust placed in them is so great, the need to detect a firefighter who is impaired at work is equally great.

(App. 30a-31a.) Balancing the interests, the court stated: "[I]f firefighters must be ever-vigilant, we think the City can be no less vigilant in detecting impaired firefighters and removing them from the workforce." (App. 33a.) The court held that the policy was reasonable under both the Arizona Constitution and the U.S. Constitution.

The Arizona Supreme Court, applying the special needs test, found:

- Firefighters hold safety-sensitive positions. (App. 7a.)
- The City has an interest in deterring and detecting drug and alcohol use by firefighters. (App. 7a.)
- The U.S. Supreme Court has not "required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing." (App. 8a-9a.)
- Firefighters have a diminished expectation of privacy. (App. 12a.)

- The City's program has procedures in place that "work to reduce the intrusiveness of the privacy invasion." (App. 13a.)

Despite these findings, the Arizona Supreme Court reversed the court of appeals and found that the policy violated the Fourth Amendment of the United States Constitution.[5] The Court premised its decision on two factors: (1) the lack of evidence of drug use at the Mesa Fire Department; and, (2) the random, unannounced nature of the searches. The Court concluded that because there is no evidence of drug use at the Mesa Fire Department, there is not a "real" or "substantial" threat to public safety. (App. 11a.) The Court held that even the firefighters' "diminished expectation of privacy" outweighs the City's interest in public safety. (App. 16a.)

REASONS FOR GRANTING THE PETITION

The Arizona Supreme Court struck down a policy implemented to protect the public from the dangers associated with firefighters who are impaired on the job. Other circuits and states have upheld random drug testing of truck drivers,[6] horse racing jockeys,[7] airport maintenance workers,[8] and flight attendants[9] in order to ensure public safety in these purportedly safety-sensitive positions. According to the Arizona Supreme Court, however, Arizona municipalities

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[5] The Arizona Supreme Court did not discuss whether the policy was permissible under the Arizona Constitution.

[6] *See, e.g., Int'l Bhd. of Teamsters v. Dep't of Trans.*, 932 F.2d 1292, 1300 (9th Cir. 1991).

[7] *See, e.g., Dimeo v. Griffin*, 943 F.2d 679, 683-85 (7th Cir. 1991); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986).

[8] *See Boesche v. Raleigh-Durham Airport Auth.*, 432 S.E.2d 137, 140 (N.C. Ct. App. 1993).

[9] *See Bluestein v. Skinner*, 908 F.2d 451, 454-57 (9th Cir. 1990).

without a history of drug abuse in the fire department are not permitted to randomly test their firefighters.

This petition should be accepted for three reasons: the decision (1) conflicts with the principles established by this Court and with decisions of other circuits; (2) conflicts with federal statutes and regulations that require random testing of safety-sensitive positions; and, (3) will have a substantial adverse impact on municipalities' ability to serve their communities in essential, safety-sensitive services.

I. THE ARIZONA SUPREME COURT'S DECISION IMPOSES A NEW CONSTITUTIONAL STANDARD FOR RANDOM DRUG TESTING OF SAFETY-SENSITIVE EMPLOYEES THAT CONFLICTS WITH PRINCIPLES ESTABLISHED BY THIS COURT AND THE DECISIONS OF NUMEROUS CIRCUIT COURTS.

The Arizona Supreme Court's decision imposes on Arizona governmental entities a unique constitutional standard that has not been imposed upon other employers of safety-sensitive workers. Review by this Court is needed to restore a consistent constitutional standard among the states and federal circuits.

A. The Decision Creates a New Standard for Determining the Governmental Interest Involved.

The special needs balancing test requires a balancing of the government's legitimate interest to test against the intrusion on the individual's privacy interest. *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652-53 (1995). Mesa's interest must be "important enough" to justify testing of its firefighters, but need not be a "compelling" interest. *Id.* at 661. The Arizona Supreme Court found that without historical evidence of drug use within the testing group, the govern-

ment's interest is so insubstantial it cannot be sufficient enough to permit random drug testing. (App. 8a-11a.)

This Court, however, has not required documented evidence of a drug problem to demonstrate a sufficient government interest to test. To the contrary, it upheld a suspicionless drug testing policy for Customs Service employees, even though the policy was not in response to a history of drug problems. *National Treasury Employees Union v. Von Raab*, 489 U.S 656, 673-75 (1989). In following *Von Raab*, the Federal Circuit upheld random, suspicionless drug testing of firefighters, without any discussion about prior drug use within the department. *Hatley v. Department of the Navy*, 164 F.3d 602, 605 (Fed. Cir. 1998) ("the government's compelling interest in keeping its firefighters free of drugs outweighs the expectation of privacy of these employees").

Since *Von Raab*, several federal agencies instituted random drug testing policies for safety-sensitive employees. These policies were implemented pursuant to Executive Order 12,564. The stated goal of this Order was to create a "drug-free Federal workplace."[10] The policies were not implemented because of drug abuse in the individual agencies. The policies were challenged and upheld. *See, e.g., Hartness v. Bush*, 919 F.2d 170 (D.C. Cir. 1990) (upholding random testing of executive office employees with "secret" national security clearances without discussing evidence of drug abuse by these employees); *National Treasury Employees Union v. Yeutter*, 918 F.2d 968, 971 (D.C. Cir. 1990) (upholding random testing of shuttle bus drivers without discussing evidence of drug abuse).

The Arizona Supreme Court's insistence on empirical evidence of prior drug abuse also clashes with the views of the Ninth Circuit. The Ninth Circuit upheld random drug testing

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[10] 51 Fed. Reg. 32,889 (Sept. 17, 1986).

of truck drivers even though "data documenting actual drug use by commercial drivers and its role in highway accidents were scarce." *International Brotherhood of Teamsters v. Department of Transportation*, 932 F.2d 1292, 1295 (9th Cir. 1991). There was scarce data, in *Brotherhood of Teamsters,* even though the drug testing would affect three million truck drivers. *Id.* Here, there is a relatively small group subject to testing (Mesa employs 372 firefighters). Within a small department or agency, it becomes statistically less likely to discover a drug problem until there is a significant problem or catastrophe.[11]

But even if there were no evidence of drug abuse by truckers, the Ninth Circuit would have allowed random drug testing: "Even assuming no evidence of substantial drug abuse among truck drivers existed, the FHWA's interest in deterring drug abuse and in 'preventing an otherwise pervasive societal problem from spreading' to the trucking industry would 'furnish an ample justification' for the testing program." *Id.* at 1305, quoting *Von Raab*, 489 U.S. at 674-75.

To justify its departure from this precedent, the Arizona Supreme Court distinguished *Von Raab*'s Customs Service employees from firefighters in part on the ground that firefighters are not directly involved in the interdiction of illegal drugs, do not carry firearms, and are not "required to use deadly force in the regular course of their duties." (App. 10a.) But circuit courts around the country have not required such evidence to find a sufficient governmental interest to test, and have upheld testing for employees much more removed from public safety positions than firefighters. *See, e.g., Brotherhood of Teamsters*, 932 F.2d at 1305 (truck

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[11] In other words, if there is a hypothetical drug use rate of 2% in a group of 500 employees (as apposed to 50,000 employees), there will be fewer employees on drugs. And, therefore, fewer opportunities to potentially document or discover an individual drug problem.

drivers); *Hartness*, 919 F.2d at 172-74 (executive office employees with "secret" national security clearances); *Yeutter*, 918 F.2d at 971 (shuttle bus drivers); *Dimeo v. Griffin*, 943 F.2d 679, 683-85 (7th Cir. 1991) (horse racing jockeys); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986) (same); *Aubrey v. School Board of Lafayette Parish*, 148 F.3d 559, 562-65 (5th Cir. 1998) (custodians in the public schools); *Harmon v. Thornburgh*, 878 F.2d 484, 488-92 (D.C. Cir. 1989) (Department of Justice personnel with top secret clearance); *National Federation of Federal Employees v. Cheney,* 884 F.2d 603, 610 (D.C. Cir. 1989) (aircraft personnel); *American Federation of Government Employees v. Skinner*, 885 F.2d 884, 891 (D.C. Cir. 1989) (motor vehicle operators); *see also Smith v. Fresno Irrigation District*, 84 Cal. Rptr. 2d 775, 782-88 (Cal. Ct. App. 1999) (construction and maintenance workers); *Boesche v. Raleigh-Durham Airport Authority*, 432 S.E.2d 137, 140 (N.C. Ct. App. 1993) (airport maintenance mechanics).

In this context, it becomes clear that the Arizona Supreme Court improperly used the lack of documented drug use—or even a rumor of drug use[12]—to unfairly minimize the real and substantial risk to public safety involved with potential drug use among firefighters.

The gravity of the potential harm, alone, can be sufficient to warrant random drug testing. *Von Raab*, 489 U.S. at 674-75; *see also Hartness*, 919 F.2d at 173 ("We consistently assumed that some jobs . . . *create sufficiently grave risks* as to make random drug testing reasonable in all circumstances." (emphasis added)). The firefighter's job is one

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[12] The court noted that "the record includes not even an allegation or rumor that the City's firefighters used or abused drugs or alcohol," (App. 8a.), thus raising the question of whether the Arizona Supreme Court would find a sufficient interest for random drug testing based only on rumor.

involving the kind of grave risks that make random drug testing reasonable. *Hatley,* 164 F.3d at 604 ("Petitioner was a firefighter. The safety of others was in his hands, and impairment due to drug use could well have led to otherwise avoidable injury or death"); *see also Penny v. Kennedy*, 915 F.2d 1065, 1067 (6th Cir. 1990) ("[The municipality] has a compelling interest in ensuring that the duties of fire fighters and police officers are performed free of any risk of impairment by the use of illegal drugs.").[13] Firefighters are the front-line responders to local emergencies. They administer invasive medical treatment, have access to and administer prescription drugs, operate large emergency vehicles outside the bounds of normal traffic control laws, and are called upon to perform heroic rescues in times of crisis. In the Arizona Supreme Court's words,

> The safety risks associated with becoming a firefighter are well known. We entrust firefighters with protecting both the community at large and their colleagues from danger, while putting their own well-being at great risk of harm. A firefighter's ability to do this job in a safe and effective manner depends, in substantial part, on his or her health and fitness.

(App. 12a.) And as seen during and since September 11th, firefighters are an integral part of this country's ability to respond to terrorism. Firefighters' duties, no less than railroad engineers' duties, are "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner*, 489 U.S. at 628. And in firefighting, like aviation, "[a] single drug-related

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[13] As the Arizona court of appeals recognized: "Given the daunting responsibilities they must shoulder on a moment's notice, firefighters expect, and necessarily accede to, more governmental regulation than most workers. Because the trust placed in them is so great, the need to detect a firefighter who is impaired at work is equally great." (App. 30a-31a.)

lapse by any covered employee could have irreversible and calamitous consequences." *Cheney*, 884 F.2d at 610. Where "the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal." *Von Raab*, 489 U.S. at 675.

In short, deterrence of drug abuse in a profession with the potential for catastrophic harm constitutes a compelling government interest warranting random drug testing of these employees. "Random drug testing, as compared with other forms of testing, offers the best potential deterrent to drug use. This factor, coupled with the possibility of a catastrophic accident, is sufficient to show a strong governmental interest in random testing." *International Brotherhood of Electrical Workers Local 1245 v. Skinner*, 913 F.2d 1454, 1463 (9th Cir. 1990); *see also Von Raab*, 489 U.S. at 674-75; *Brotherhood of Teamsters*, 932 F.2d at 1305; *Bluestein*, 908 F.2d at 456.

The Mesa fire department's good fortune of not having any fatalities or injuries due to drug use does not eliminate the future threat to the public should a firefighter abuse drugs. Mesa should be allowed to use the same reasonable measures that other governmental entities have been authorized to use to minimize risks to the public.

B. The Decision Creates a New Standard for Determining the Individual Interest Involved.

The other side of the special needs balancing test requires an examination of the individual's Fourth Amendment interests. *Vernonia*, 515 U.S. at 654-58. The Arizona Supreme Court, here, improperly made the random aspect of the drug testing policy the crux of the inquiry in analyzing the individual's privacy interest. The Court begins the analysis by appropriately recognizing that firefighters have a "diminished expectation of privacy and should reasonably expect

some intrusion into matters involving their health and fitness." (App. 12a.) *See also Doe v. City and County of Honolulu*, 816 P.2d 306, 314-15 (Haw. Ct. App. 1991) (finding firefighters have a diminished expectation of privacy and should expect inquiry into their fitness and probity).

The Arizona Supreme Court also found that Mesa's procedural safeguards for testing "work to reduce the intrusiveness of the privacy invasion." (App. 13a.) The Court, actually, understated the effect of these safeguards. Mesa's procedural safeguards were patterned after the federal standards adopted by the Department of Health and Human Services.[14] This Court has already found that safeguards nearly identical to Mesa's rendered the intrusion of drug testing "negligible." *Board of Education of Independent School District No. 92 v. Earls*, 536 U.S. 822, 833 (2002) ("Given that we considered the method of collection in *Vernonia* a 'negligible' intrusion, the method here is even less problematic." (citation omitted)); *Vernonia* 515 U.S. at 658 ("Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible").

The Arizona Supreme Court then departs from this Court's analysis that such intrusions are negligible by embracing the analysis of the Alaska Supreme Court, which equated random testing to "a continuous and unrelenting government scrutiny that exposes the employee to unannounced testing at virtually any time."[15] The Alaskan court, however, was interpreting privacy interest under its state constitution. The Arizona Supreme Court has now engrafted this Alaskan state

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[14] Department of Health and Human Services Mandatory Guidelines for Federal Workplace Drug Testing Programs, 49 C.F.R. 40 (2003).

[15] (App. 15a.) (citing *Anchorage Police Department Employees Association. v. Municipality of Anchorage*, 24 P.3d 547, 557-58 (Alaska 2001)).

constitutional analysis onto the Fourth Amendment of United States Constitution.

Simply, the Arizona Supreme Court decision equates random testing to "continuous and unrelenting government scrutiny"[16] that creates "fear and surprise."[17] In so doing, the court mushroomed the privacy intrusion from negligible to substantial and prohibited. No other court has made the random aspect of a drug testing policy a cornerstone in analyzing the individual's Fourth Amendment interest.

Other courts certainly have considered the random aspect of a testing policy as part of the balancing test, but not a decisive or significant factor. *See, e.g., Brotherhood of Teamsters,* 932 F.2d at 1303 ("[w]hile random testing by definition involves some element of surprise, the amount of anxiety should not be substantial"). In a "particularly close case," the limited surprise from random testing can be a relevant consideration that may tip the scales. *Id.* (*citing Bluestein*, 908 F.2d at 456-57). There is no authority, however, for treating it as the Arizona Supreme Court did—as the crux in determining the privacy intrusion. The Arizona Supreme Court's new rule—that randomness transmutes a negligible intrusion into a substantial and prohibited intrusion—conflicts with principles from this Court and decisions from circuit courts.[18]

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[16] (App. 15a.)

[17] (App. 10a.)

[18] Common sense also undermines the Arizona Supreme Court's logic. It is illogical to believe that the lack of advance notice of a "negligibly intrusive" drug test will cause the kind of "fear and surprise" in firefighters that would catapult their privacy interests above the substantial governmental interest in ensuring a drug-free fire department, when those same firefighters are called upon and are expected to—randomly and without notice—respond calmly and professionally to tragic and often graphically disturbing catastrophes.

In summary, the Arizona Supreme Court's decision conflicts with the decisions of this Court and with those of the Third,[19] Fourth,[20] Fifth,[21] Sixth,[22] Seventh,[23] Ninth,[24] Federal,[25] and the D.C. Circuits.[26] Because its resolution of this important federal question conflicts with the decisions of this Court and many circuit courts, the City of Mesa respectfully requests the Court to grant the writ.

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[19] *Policemen's Benevolent Ass'n of New Jersey, Local 318 v. Township of Washington*, 850 F.2d 133, 141 (3d Cir. 1988) (upholding random testing of police officers without evidence of drug abuse in department).

[20] *Thomson v. Marsh*, 884 F.2d 113, 114 (4th Cir. 1989) (civilian biochemists and pipe fitters in U.S. Army subject to random testing).

[21] *Aubrey*, 148 F.3d at 562-65 (school custodian constitutes safety-sensitive position subject to random testing).

[22] *Knox County Ed. Ass'n v. Knox County Bd. of Ed.*, 158 F.3d 361, 373-83 (6th Cir. 1998) (drug history not required to randomly test teachers).

[23] *Dimeo*, 943 F.2d at 683 (significant government interest to test jockeys due to potential accidents and loss of tax revenues from gambling); *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989).

[24] *Bhd. of Teamsters*, 932 F.2d at 1300 ("scarce" evidence of drug use does not prevent random testing of commercial drivers); *Bhd. of Elec. Workers*, 913 F.2d at 1463 (potential for catastrophic consequences justifies random testing in pipeline industry despite lack of drug use history).

[25] *Hatley*, 164 F.3d at 605 (upholding random suspicionless drug testing of firefighters).

[26] *Yeutter*, 918 F.2d at 971-72 (shuttle bus drivers randomly tested without history of drug abuse); *Harmon*, 878 F.2d at 488-92 (evidence of drug use not needed to randomly test attorneys with top secret clearance); *Cheney*, 884 F.2d at 610 (aircraft attendants tasks are "fraught with extraordinary peril," warranting random testing); *American Fed'n of Gov't Employees*, 885 F.2d at 891 (random testing of motor vehicle operators "intimately related" to public safety).

II. THE ARIZONA SUPREME COURT'S DECISION CONFLICTS WITH FEDERAL STATUTES AND REGULATIONS THAT REQUIRE RANDOM DRUG TESTING OF SAFETY-SENSITIVE POSITIONS.

Federal statutes and regulations mandate the random drug testing of certain safety-sensitive employees. These federal regulations require Mesa to randomly test approximately five hundred of its employees (such as gas pipeline workers, solid waste equipment operators, fleet mechanics, and street and park maintenance personnel). The Arizona Supreme Court's decision in this case places Mesa in a potentially untenable position: being federally required to randomly drug test its employees under conditions the Arizona Supreme Court held to be unconstitutional.

Federal law requires random drug testing of certain employees holding safety-sensitive positions.[27] States and cities, like Mesa, that employ such persons must randomly drug test those employees[28] to be eligible for federal highway funds.[29] For example, all employees required to operate a commercial vehicle must hold a commercial driver's license (CDL) and are subject to random testing under the federal regulations.[30] While firefighters in Arizona are not required to hold a CDL, there are approximately four hundred employees in Mesa that do operate commercial vehicles, and thus are subject to fed-

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[27] Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 5331 (1991); Federal Aviation Administration, 14 C.F.R. § 61 (2003); Federal Motor Carrier Safety Administration, 49 C.F.R. § 382 (2003); Federal Railroad Administration, 49 C.F.R. § 219 (2003); Federal Transit Administration, 49 C.F.R. § 655 (2003); Research and Special Programs Administration, 49 C.F.R. § 199 (2003).

[28] *See, e.g.*, 49 C.F.R. § 382; 383; 384 (2003); 49 C.F.R. § 199 (2003).

[29] 49 U.S.C. § 5331(g).

[30] 49 C.F.R. § 382.107; 382.305; 384.201 (2003).

erally mandated random drug testing. Similarly, people who operate, maintain, or provide emergency response for pipelines or liquefied natural gas are safety-sensitive and are required to be randomly drug tested.[31] Mesa employs approximately 100 people who are randomly tested under these requirements.

None of these federal regulations make an exception for municipalities having no history of drug abuse, nor, obviously, is the "unannounced" nature of the test an overriding concern that serves to obviate the need and requirement for random testing. Under the Arizona Supreme Court's decision in this case, however, if there is no historical evidence of drug abuse within the specific department being tested, there is an insufficient government interest to support random testing. Moreover, if the test is random, the Arizona Supreme Court has now held that this constitutes a substantial infringement on the individual's privacy interest.

Whether Mesa's departments subject to mandatory federal testing have a sufficient (or any) history of drug abuse is unknown. Presumably, however, as with Mesa's firefighters, random testing of departmental employees with no history of drug abuse would be struck down under the precepts set forth by the Arizona Supreme Court. Neither the City of Mesa, nor any other city in Arizona, should be forced to choose between following federal statutory mandates or following the Arizona Supreme Court's decision. Mesa, and all other Arizona cities need this Court's guidance on this important federal issue.

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[31] *See* 49 C.F.R. § 199.

III. THE ARIZONA SUPREME COURT'S DECISION WILL HAVE A SUBSTANTIAL ADVERSE IMPACT ON MUNICIPALITIES' ABILITY TO SERVE THEIR COMMUNITIES IN ESSENTIAL, SAFETY-SENSITIVE SERVICES.

No one disputes that firefighters are an integral component of society's safety and well-being. A few minutes' delay due to impaired abilities could make the difference between life and death.[32] And since September 11th, firefighters have become an even more important and visible part of our nation's defense and response to terrorism. On this background, one cannot overstate the importance of Mesa's governmental interest in proactively protecting the public from the very real dangers that drug abuse would cause in this safety-sensitive profession. The Arizona Supreme Court's decision compromises the City's ability to maintain the integrity of safety-sensitive professions from drug abuse, and unwisely forces the public to "bear the risk" that firefighters may be under the influence of drugs while performing their duties.

On a larger scale, the decision could be applied to municipal entities other than fire departments. Its analysis can, and undoubtedly will, be employed in analyzing the validity of—and potentially in striking down—random drug testing for all similar safety-sensitive professions.

Finally, the decision raises new issues as to what will constitute sufficient documented drug use to justify random testing. Will deaths or injuries due to drug use have to be

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[32] *County of Honolulu,* 816 P.2d at 316 ("[Firefighters must] respond quickly and effectively at a moment's notice. Impaired abilities caused by drug use may beget delays in responding to fires or other public emergencies. A few minutes could mark the difference between saving one of several occupants in a building or losing the occupants and/or the structure in a blaze.").

suffered before a defined risk exists? Or, is one documented drug abuser (or several) within a department sufficient? Or, as the court intimated, will rumors of abuse suffice? Whatever the answer, in no case should a program of deterrence be forced to await the blossoming of a drug abuse problem within a specific department. As this Court observed in the context of randomly testing students: "Indeed it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use." *Earls*, 536 U.S. at 836.

It can hardly be in the public's best interest to prevent Mesa from using reasonable measures to minimize future risks to its citizens. For the citizens of Mesa and other municipalities, this Court should grant review.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

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May 26, 2004

APPENDICES

APPENDIX A

SUPREME COURT OF ARIZONA
EN BANC

[Filed Jan. 27, 2004]

No. CV-03-0100-PR

CRAIG W. PETERSEN,
Plaintiff-Appellee,

v.

CITY OF MESA,
Defendant-Appellant.

OPINION

McGREGOR, *Vice Chief Justice.*

This case requires us to determine the constitutionality of a city's random, suspicionless drug testing of its firefighters. We exercise jurisdiction pursuant to Article VI, Section 5.3 of the Arizona Constitution, Arizona Revised Statutes (A.R.S.) section 12-120.24, and Rule 23 of the Arizona Rules of Civil Appellate Procedure.

I.

Craig Petersen works as a firefighter for the City of Mesa. In 2001, after Petersen was hired, the City implemented a substance abuse program (the Program) for the Mesa Fire Department. The Program requires testing of firefighters (1) if the Department has reasonable suspicion to believe an individual firefighter has abused drugs or alcohol; (2) after a firefighter is involved in an accident on the job; (3) following a firefighter's return to duty or as a follow-up to "a deter-

mination that a covered member is in need of assistance"; and (4) "on an unannounced and random basis spread reasonably throughout the calendar year."

Under the Program's random testing provision, a computer program selects the firefighters to be tested. The Department notifies firefighters of their selection for random testing immediately before, during, or after work; the firefighters are to be tested within thirty minutes of their notification, with allowance for travel time to the laboratory for collection. Once at the laboratory, firefighters are permitted to use private bathroom stalls when providing urine samples, which are then inspected by a monitor for the proper color and temperature.

The laboratory tests the sample for the presence of marijuana, cocaine, opiates, amphetamines, and phencyclidine.[1] The laboratory initially tests the specimens by using an immunoassay test that meets the requirements of the Food and Drug Administration for commercial distribution. The laboratory then confirms all positive test results using the gas chromatography/mass spectrometry technique and reports positive results to a Medical Review Officer (MRO), who has a "detailed knowledge of possible alternate medical explanations." The MRO reviews the results before giving the information to the Department's administrative official. Only confirmed tests are reported to the Department as positive for a specific drug. Before verifying a positive result, however, the MRO must contact the firefighter on a confidential basis.

The Department does not release information in a firefighter's drug testing record outside the Department without the firefighter's consent. A firefighter whose test reveals a blood alcohol concentration in excess of that allowed under

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[1] In addition, twenty percent of those tested are selected for an alcohol breath test.

the Program or who tests positive for any of several specified drugs is removed from all covered positions and is evaluated by a substance abuse professional. The Department may discipline or terminate the employment of a firefighter who tests positive a second time or who refuses to submit to a required test.

According to section 8 of the Program, the primary purpose of the random testing component "is to deter prohibited alcohol and controlled substance use and to detect prohibited use for the purpose of removing identified users from the safety-sensitive work force." This purpose advances the City's goal of establishing "a work environment that is totally free of the harmful effects of drugs and the misuse of alcohol."

Petersen filed a complaint in superior court seeking declaratory and injunctive relief, alleging that the random testing component of the Program violated his rights under both *Article II, Section 8 of the Arizona Constitution* and the Fourth Amendment to the United States Constitution.[2] The trial court held that the Program violated the Arizona Constitution and permanently enjoined the Department from continuing random, suspicionless drug and alcohol testing of the City's firefighters. The court of appeals reversed, holding that the Program's random testing component is reasonable under both the Arizona and United States Constitutions. The court reasoned that the City's "compelling need to discover specific but hidden conditions representing grave risks to the health and safety of the firefighters and the public" outweighed Petersen's privacy interests. *Petersen v. City of Mesa*, 204 Ariz. 278, 286 ¶ 34, 63 P.3d 309, 317 (App.2003).

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[2] Petersen does not challenge testing on the basis of reasonable suspicion, after an on-the-job accident, following a return to duty, or as a follow-up to "a determination that a covered member is in need of assistance." As a result, we express no opinion regarding the constitutionality of these Program provisions.

Judge Hall dissented from the majority's conclusion that the random testing component of the Program is reasonable under the Fourth Amendment. *Id.* at 290-91 ¶ 49, 63 P.3d at 321-22 (Hall, J., concurring in part and dissenting in part).

Under the analysis set forth below, we hold that the Program's random testing component is unreasonable and therefore violates the Fourth Amendment to the United States Constitution.[3]

II.

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 613-14, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). In this case, the parties agree

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[3] Petersen argues that Article II, Section 8 of the Arizona Constitution, which expressly provides that "[n]o person shall be disturbed in his private affairs . . . without authority of law," affords greater protection against drug testing than does the Fourth Amendment. Our conclusion that the random testing component violates the Fourth Amendment obviates the need to consider whether the protections granted by the Arizona Constitution extend beyond those afforded defendants by the federal constitution. Although the Arizona Constitution may impose stricter standards on searches and seizures than does the federal constitution, Arizona courts cannot provide less protection than does the Fourth Amendment. See, e.g., Cooper v. California, 386 U.S. 58, 62, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967) ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so."); Arnold v. City of Cleveland, 67 Ohio St.3d 35, 616 N.E.2d 163, 169 (1993) ("In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall.").

that the City's collection and testing of a firefighter's urine and breath constitutes a "search" under the Fourth Amendment. *See, e.g., id.* at 617, 109 S.Ct. 1402 ("Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable . . . these intrusions must be deemed searches under the Fourth Amendment.").

As the language of the Fourth Amendment makes clear, "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). To be reasonable, a search generally must be based upon some level of individualized suspicion of wrongdoing. *Skinner*, 489 U.S. at 624, 109 S.Ct. 1402. The purpose of requiring individualized suspicion "is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents." *Id.* at 621-22, 109 S.Ct. 1402.

The Supreme Court, however, has recognized limited exceptions to this general rule "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Id.* at 619, 109 S.Ct. 1402 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987)). "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Id.* at 624, 109 S.Ct. 1402.

The City concedes that its use of random, suspicionless testing is not based on any level of individualized suspicion. The City argues, however, that such testing is reasonable under the Fourth Amendment because the search "serves special governmental needs, beyond the normal need for law

enforcement." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). Because the Department does not disclose test results to law enforcement officers or to other third parties without the firefighter's consent, Petersen recognizes that the Program is unrelated to the normal need for law enforcement. Petersen maintains, however, that the City cannot enforce the Program's random testing component because the City's alleged "special needs" offered in support of the program are insufficient to overcome the privacy intrusion occasioned by the search. Based on the record in this case, we agree.

A.

Neither the Supreme Court nor this court has considered the reasonableness of random, suspicionless testing of city firefighters. The Supreme Court, however, has examined the constitutionality of suspicionless drug testing requirements analogous to the procedures Petersen challenges. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) (high school students participating in competitive extracurricular activities); *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997) (candidates for political office); *Vernonia*, 515 U.S. 646, 115 S.Ct. 2386 (high school students participating in interscholastic athletics); *Skinner*, 489 U.S. 602, 109 S.Ct. 1402 (railway employees); *Von Raab*, 489 U.S. 656, 109 S.Ct. 1384 (customs service agents); *see also Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281 (2001) (holding unconstitutional a state hospital's drug testing of pregnant patients that involved hospital personnel notifying the police of patients who tested positive for cocaine). As each of these decisions illustrates, when presented with an alleged "special need" in support of a particular Fourth Amendment intrusion, a court must weigh the individual's Fourth Amendment interests against the proffered governmental interests to determine whether the search in question

"fit[s] within the closely guarded category of constitutionally permissible suspicionless searches." *Chandler*, 520 U.S. at 309, 117 S.Ct. 1295.

Applying this "special needs" balancing test to the facts presented in this case, we begin by analyzing the City's proffered interests. Although the City need not present a "compelling" interest, the City's interest must be "important enough" to justify the government's intrusion into the firefighters' legitimate expectations of privacy. *Vernonia*, 515 U.S. at 661, 115 S.Ct. 2386.

The City asserts that it has a "special need" to test firefighters because they occupy safety-sensitive positions. The City alleges that random testing furthers this interest by deterring "prohibited alcohol and controlled substance use" and detecting "prohibited use for the purpose of removing identified users from the safety-sensitive work force." We agree that the City has an interest in deterring and detecting prohibited alcohol and drug use among the City's firefighters.

Fourth Amendment analysis, however, requires that we do more than recognize that the City has an interest in deterring drug use among employees in safety-sensitive positions. In addition, we must look to the nature and immediacy of the City's concern. *Id.* at 660, 115 S.Ct. 2386. That is, has the City identified a real and substantial risk? *Chandler*, 520 U.S. at 323, 117 S.Ct. 1295. If so, will the City's proposed invasion of its firefighters' privacy interests further the City's interest in deterring and detecting drug use among its firefighters? *Skinner*, 489 U.S. at 624, 109 S.Ct. 1402. Answering that question requires that we consider the efficacy of the Program in meeting the City's concern, *Vernonia*, 515 U.S. at 660, 115 S.Ct. 2386, and whether the invasion of privacy is calibrated to the defined risk, *Chandler*, 520 U.S. at 321-23, 117 S.Ct. 1295.

The record before us provides little information about the City's reasons for adopting random testing and provides no evidence to explain the City's perceived need to conduct such testing. As the City conceded at oral argument, the record is devoid of any indication that the City has ever encountered any problem involving drug use by its firefighters. The record lacks not only evidence of even a single instance of drug use among the firefighters to be tested but also any evidence of accidents, fatalities, injuries, or property damage that can be attributed to drug or alcohol use by the City's firefighters. No evidence of record suggests that the firefighters asked for or consented to the testing policy, and the record includes not even an allegation or rumor that the City's firefighters used or abused drugs or alcohol. Based on this record, we detect no real and substantial risk that the public safety is threatened by drug or alcohol use among the firefighters to be tested. The absence of evidence of drug use, at least as reflected in the record, provides no basis for us to conclude that random, suspicionless testing is calibrated to respond to any defined risk. At most, the Program's random testing component furthers only a generalized, unsubstantiated interest in deterring and detecting a hypothetical drug abuse problem among the City's firefighters.[4]

Nonetheless, relying primarily upon *Von Raab, Vernonia,* and *Earls*, the City asserts that the Supreme Court "has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing." *Earls*, 536 U.S. at 835, 122 S.Ct. 2559. The City's

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[4] While we recognize and applaud the City's interest in deterring drug use among firefighters, the Program also requires testing upon reasonable suspicion, after an accident on the job, and following a return to duty or as a follow-up to "a determination that a covered member is in need of assistance." The record before us provides no basis for concluding that these testing alternatives fail to deter and detect drug use among the City's firefighters.

argument accurately reflects language from the cases upon which it relies. These cases, however, focused on a number of important factors that differ from the facts of this case and therefore offer limited support for the City's argument.

In *Von Raab*, the Court examined the constitutionality of a United States Customs Service program requiring Customs Service employees to submit to suspicionless testing upon promotion or transfer to positions directly involved in the interdiction of illegal drugs or positions that required carrying a firearm. 489 U.S. at 660, 109 S.Ct. 1384. Although the Customs Service did not adopt its policy in response to a history of drug and alcohol abuse problems, *id.*, the plan was developed for an agency that the Court recognized as "our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population." *Id.* at 668, 109 S.Ct. 1384. The Court reasoned that those employees directly involved in drug interdiction or carrying a firearm could jeopardize the agency's "almost unique mission." *Id.* at 674, 109 S.Ct. 1384. As a result, the Court concluded that the Customs Service had a compelling interest in assuring that users of illegal drugs would not be placed in these positions. *Id.* at 670- 71, 109 S.Ct. 1384. In upholding the testing regime, the Court also noted that the testing program provided advance notice of the scheduled sample collection. *Id.* at 672 n. 2, 109 S.Ct. 1384. In addition, the Court focused on the context in which the Service's testing program was implemented, which the Court described as an environment in which "it is not feasible to subject employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments." *Id.* at 674, 109 S.Ct. 1384. Given these particular facts, as the Court later emphatically stated, "[*Von Raab* is] [h]ardly a decision opening broad vistas for suspicionless searches [and it] must be read in its unique context." *Chandler*, 520 U.S. at 321, 117 S.Ct. 1295.

Unlike the Customs Service employees in *Von Raab*, the City's firefighters are not directly involved in drug interdiction, do not carry a firearm, and are not required to use deadly force in the regular course of their duties. In addition, the firefighters' communal work environment provides a better opportunity for supervisors to detect drug use and therefore develop reasonable suspicion to conduct a test under appropriate circumstances. This environment reduces the risk that a firefighter could cause "great human loss before any signs of impairment become noticeable to supervisors or others." *Skinner*, 489 U.S. at 628, 109 S.Ct. 1402. Finally, as we discuss below, the element of "fear and surprise" inherent in the Program's random testing procedures results in a broader and more intrusive privacy invasion than did the testing procedures approved in *Von Raab*. *Von Raab*, 489 U.S. at 672 n. 2, 109 S.Ct. 1384 (noting that the advance notice given of the scheduled sample collection reduces "to a minimum any 'unsettling show of authority'" (quoting *Delaware v. Prouse*, 440 U.S. 648, 657, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979))).

Vernonia and *Earls* also provide limited support for the City's random testing of its firefighters. In *Vernonia* and *Earls*, the Court upheld school district policies that required students participating in extracurricular activities to submit to random drug tests. *Earls*, 536 U.S. at 838, 122 S.Ct. 2559 (finding school district policy, which included random testing of students participating in extracurricular activities, to be constitutional); *Vernonia*, 515 U.S. at 664-65, 115 S.Ct. 2386 (upholding school district's policy authorizing random drug testing of students participating in interscholastic athletics). In upholding the policies, the Court emphasized in both decisions that "'Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children.'" *Earls*, 536 U.S. at 829-30, 122 S.Ct. 2559 (quoting *Vernonia*, 515 U.S. at 656, 115 S.Ct. 2386).

Firefighters, of course, have little in common with students entrusted to the government's care. As Judge Hall correctly noted, "unlike a public school student['s right to privacy], a firefighter's right to privacy, although limited in some respects, is not inherently 'subject[ ] to greater controls than those appropriate for adults.'" *Petersen*, 204 Ariz. at 289 ¶ 44, 63 P.3d at 320 (Hall, J., concurring in part and dissenting in part) (quoting *Earls*, 536 U.S. at 831, 122 S.Ct. 2559). On this basis alone, we have little trouble distinguishing *Vernonia* and *Earls* from this case.

Moreover, unlike the record in this case, the records in both the *Earls* and *Vernonia* actions presented specific evidence of drug use that supported the districts' decisions to institute the testing regimes. In *Vernonia*, an "immediate crisis," 515 U.S. at 663, 115 S.Ct. 2386, brought about by a "sharp increase in drug use," *id.* at 648, 115 S.Ct. 2386, sparked installation of the testing program. Similarly, the *Earls* Court noted that the "School District ha[d] provided sufficient evidence to shore up the need for its testing program." 536 U.S. at 835, 122 S.Ct. 2559.

Given the dearth of evidence by which we can measure the strength of the City's proffered "special need" and the City's failure to articulate how the Program's random testing procedures further its interests, we conclude that the City has failed to define any real and substantial risk that random, suspicionless testing is designed to address. Nonetheless, because the Supreme Court has stated that a lack of empirical data, by itself, is not fatal to a suspicionless testing program, *Von Raab*, 489 U.S. at 673-75, 109 S.Ct. 1384, we now consider the extent of Petersen's acknowledged Fourth Amendment privacy interests and then balance these interests against the City's generalized, unsubstantiated interest in deterring and detecting substance abuse among the City's firefighters.

B.

The collection of urine and breath samples for purposes of drug and alcohol testing "infringes an expectation of privacy that society is prepared to recognize as reasonable." *Skinner*, 489 U.S. at 616, 109 S.Ct. 1402. Nevertheless, "'operational realities of the workplace' may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts." *Von Raab*, 489 U.S. at 671, 109 S.Ct. 1384 (quoting *O'Connor v. Ortega*, 480 U.S. 709, 717, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987)). In *Skinner*, for example, the Court found that railway employees' expectation of privacy is "diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." 489 U.S. at 627, 109 S.Ct. 1402.

As was true of the railway employees in *Skinner*, the City's firefighters possess a diminished expectation of privacy. The safety risks associated with becoming a firefighter are well known. We entrust firefighters with protecting both the community at large and their colleagues from danger, while putting their own well-being at great risk of harm. A firefighter's ability to do this job in a safe and effective manner depends, in substantial part, on his or her health and fitness. In addition, a firefighter, while on duty, lives in a communal environment. Given all these factors, we conclude that individuals who elect to become firefighters should anticipate a diminished expectation of privacy and should reasonably expect some intrusion into matters involving their health and fitness.

The strength of any asserted privacy interest also turns upon the "character of the intrusion." *Vernonia*, 515 U.S. at 658, 115 S.Ct. 2386. Although any program that compels urinalysis affects privacy interests, the City has designed its Program to reduce its intrusion upon the firefighters' privacy

interests. *See, e.g., id.* (concluding that "the degree of intrusion depends upon the manner in which production of the urine sample is monitored"). The Program permits firefighters providing samples to use private bathroom stalls at the designated testing facility, where they are not subject to direct monitoring. The firefighter then gives the sample to an authorized monitor for color and temperature testing. The laboratory confirms any initial positive test by using gas chromatography/mass spectrometry techniques, which reduces the specter of a "false positive" test result. *See, e.g.*, Karen Manfield, *Imposing Liability on Drug Testing Laboratories for "False Positives": Getting Around Privity*, 64 U. Chi. L.Rev. 287, 290-92 (1997) (stating that retesting positive results with a properly administered gas chromatography test "would eliminate virtually all the false positives"). The MRO reviews the results and contacts the firefighter on a confidential basis. In addition, the Department does not release testing records outside the Department without the firefighter's consent.

These procedures, which attempt to guard the firefighters' privacy interests to the extent possible, all work to reduce the intrusiveness of the privacy invasion. Nonetheless, given the random nature of these searches, we cannot conclude that "the privacy interests implicated by the search are minimal." *Skinner*, 489 U.S. at 624, 109 S.Ct. 1402.

The Supreme Court has not examined random testing procedures outside of the unique school setting. *Earls*, 536 U.S. 822, 122 S.Ct. 2559; *Vernonia*, 515 U.S. 646, 115 S.Ct. 2386. In both *Vernonia* and *Earls*, the Court upheld school district policies requiring students participating in extracurricular activities to submit to random drug testing. In both cases, without directly addressing the privacy implications of a random search, the Court upheld the challenged searches based primarily upon "'the schools' custodial and tutelary

responsibility for children.'" *Earls*, 536 U.S. at 829-30, 122 S.Ct. 2559 (quoting *Vernonia*, 515 U.S. at 656, 115 S.Ct. 2386).

Outside the school context, the Court has recognized that notification in advance of a scheduled search minimizes the intrusiveness of the search. *Von Raab*, 489 U.S. at 672 n. 2, 109 S.Ct. 1384; *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 559, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (noting that the intrusion on privacy occasioned by routine checkpoints is minimized by the fact that motorists "are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere"). In *Von Raab*, for example, the Court identified the advance notice given as a factor in upholding the suspicionless testing of Customs Service employees. 489 U.S. at 672 n. 2, 109 S.Ct. 1384. The *Von Raab* Court stated:

> Only employees who have been tentatively accepted for promotion or transfer to one of the three categories of covered positions are tested, and applicants know at the outset that a drug test is a requirement of those positions. Employees are also notified in advance of the scheduled sample collection, thus reducing to a minimum any "unsettling show of authority" that may be associated with unexpected intrusions on privacy.

Id. (quoting *Delaware*, 440 U.S. at 657, 99 S.Ct. 1391).

Consistent with the Court's statements in *Von Raab*, a number of federal and state courts have acknowledged the increased privacy concerns occasioned by random testing. *See, e.g., Bluestein v. Skinner*, 908 F.2d 451, 456-57 (9th Cir.1990) (finding the fact that the challenged testing program provided for unannounced and random tests added "some weight to the 'invasion of privacy' side of the Fourth Amendment balance"); *Harmon v. Thornburgh*, 878 F.2d 484, 489 (D.C.Cir.1989) ("Certainly the random nature of

the . . . testing plan is a *relevant* consideration; and, in a particularly close case, it is possible that this factor would tip the scales."); *Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001). In *Anchorage,* for example, the Alaska Supreme Court, relying upon the Alaska Constitution, concluded that the random testing of firefighters is qualitatively different from suspicionless testing that occurs prior to employment, upon promotion, demotion or transfer, and after a traffic accident. *Anchorage*, 24 P.3d at 557. The court reasoned:

> Because the policy's provision for random testing could subject employees to "unannounced" probing throughout the course of their employment, the tests are peculiarly capable of being viewed as "unexpected intrusions on privacy." For example, it might seem manifestly unreasonable for any person applying for a safety-sensitive position in a heavily regulated field of activity not to anticipate—and implicitly agree to—a probing inquiry into the applicant's capacity to perform job-related duties; the same would hold true for any employee who might be promoted, demoted, transferred, or become involved in a job-related accident. But a job applicant or employee who anticipated such inquiries might nevertheless expect not to be subjected to a continuous and unrelenting government scrutiny that exposes the employee to unannounced testing at virtually any time. Such expectations cannot be so readily dismissed as patently unreasonable.

Id. at 557-58 (citations omitted).

Although the Alaska Supreme Court analyzed the Anchorage plan under its state constitution, we find the court's reasoning about the difference between random and announced or scheduled tests persuasive. The very nature of random, suspicionless searches precludes any advance notification and subjects employees to continuous government

scrutiny. Random testing, therefore, necessarily raises the specter of the "'unsettling show of authority' that may be associated with unexpected intrusions on privacy." *Von Raab*, 489 U.S. at 672 n. 2, 109 S.Ct. 1384 (quoting *Delaware*, 440 U.S. at 657, 99 S.Ct. 1391). Accordingly, we conclude that random, suspicionless drug testing, while not *per se* unreasonable, invades reasonable privacy interests even when the government collects the urine sample in a relatively unintrusive manner and takes steps to protect employees' privacy interests by limiting the information that is disclosed.

III.

Balancing Petersen's privacy interests against the interests the City advances in favor of the Program's random component, we conclude that the City's generalized and unsubstantiated interest in deterring and detecting alcohol and drug use among the City's firefighters by conducting random drug tests is insufficient to overcome even the lessened privacy interests of the firefighters in this case. The situation we consider, on this record, cannot be described as one of the "limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, [and in which] a search may be reasonable despite the absence of such suspicion." *Skinner*, 489 U.S. at 624, 109 S.Ct. 1402. Rather, the increased intrusion occasioned by the Program's random, suspicionless testing component represents the very type of "arbitrary and invasive acts by officers of the Government or those acting at their direction" against which the Fourth Amendment is meant to guard. *Id.* at 613-14, 109 S.Ct. 1402. We therefore hold, on the record before us, that the Program's random component falls outside the "closely guarded category of constitutionally permissible

suspicionless searches," *Chandler,* 520 U.S. at 309, 117 S.Ct. 1295, and violates the Fourth Amendment to the United States Constitution.

IV.

For the foregoing reasons, we vacate the court of appeals' opinion and affirm the trial court's judgment enjoining the City from enforcing the random, suspicionless component of the Program.

CONCURRING: CHARLES E. JONES, *Chief Justice*, REBECCA WHITE BERCH, MICHAEL D. RYAN and ANDREW D. HURWITZ, *Justices*.

APPENDIX B

COURT OF APPEALS OF ARIZONA,
DIVISION 1, DEPARTMENT B.

[Filed] Feb. 25, 2003

No. 1 CA-CV 02-0016

CRAIG W. PETERSEN,
Plaintiff-Appellee,

v.

CITY OF MESA,
Defendant-Appellant.

Review Granted Sept. 9, 2003

OPINION

VOSS, *Judge.*

Craig W. Petersen, a firefighter for the City of Mesa, challenged the constitutionality of the random testing component of the City's proposed Substance Abuse Program Alcohol and Controlled Substance Testing Policy and Procedures (Policy). In awarding summary judgment to Petersen and permanently enjoining the City from implementing the random, suspicionless aspect of the Policy, the trial court relied on Article 2, Section 8 of the Arizona Constitution. In this context, however, we conclude that the strictures imposed by our constitution are no greater than those of the Fourth Amendment of the United States Constitution and that random testing is not an unreasonable search in violation of

either constitution. We therefore reverse the summary judgment in favor of Petersen and vacate the injunction.

BACKGROUND

In response to Petersen's complaint for declaratory and injunctive relief, the City filed a motion to dismiss. When both parties submitted additional supporting information, the trial court treated the motion as one for summary judgment. After a hearing, the trial court found that no material facts were in dispute but that the random, suspicionless drug and alcohol testing component[1] violated Article 2, Section 8 of the Arizona Constitution. That provision states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

The trial court cited *State v. Ault*, 150 Ariz. 459, 463, 466, 724 P.2d 545, 549, 552 (1986) (Article 2, Section 8 bars admission of evidence seized during illegal search of home), and *State v. Tykwinski*, 170 Ariz. 365, 371, 824 P.2d 761, 767 (App.1991) (rejecting assertion that Article 2, Section 8, although more extensive than Fourth Amendment, requires individualized suspicion to conduct roadblock stop), in support of its conclusion that Arizona's Constitution "is broader and more explicit than the Fourth Amendment in safeguarding the fundamental liberty of Arizona citizens."[2] The court also relied on an Alaska Supreme Court decision that interpreted the Alaska Constitution to bar ongoing random drug testing as overly intrusive of employee privacy

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[1] The Policy allows for random breath and urine testing. Because the complaint, briefs, and trial court's order do not distinguish between the two types of testing for purposes of constitutional analysis, our decision similarly does not distinguish between the two types.

[2] The Fourth Amendment of the United States Constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

because the testing was not based on "predictable, job-related occurrences" and was not implemented in response to demonstrated drug abuse in the workplace. [3]*See Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage*, 24 P.3d 547, 558-59 (Alaska 2001). The trial court concluded that the City failed to demonstrate a compelling interest to justify the intrusion on Petersen's reasonable expectation of privacy and therefore enjoined random, suspicionless testing.

DISCUSSION

In reviewing a trial court's ruling on the reasonableness of a government search, we defer to that court's factual findings, but we determine de novo whether the search was unreasonable and thus violated the Constitution. *State v. Adams*, 197 Ariz. 569, 572, ¶ 16, 5 P.3d 903, 906 (App.2000).

A. The City's Policy

The stated purpose of the City's Policy is to provide firefighters "with a safe, productive working environment"; to ensure "the safety and well- being of the general public"; to ensure that firefighters "receive educational [sic] and training on substance abuse"; and to ensure that they "are well informed on the hazards of substance abuse and are provided employee assistance as needed."

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[3] The dissent also relies on this case although the Alaska Supreme Court expressly eschewed reference to the Fourth Amendment. Anchorage Police Dep't, 24 P.3d at 550 ("[W]e base our ultimate ruling exclusively on the Alaska Constitution.").

Firefighters must submit[4] to testing of breath or urine[5] "on an unannounced and random basis spread reasonably throughout the calendar year." A computer software program selects the employees to be tested. Those selected are not given any advance notice and can be notified immediately before, during, or immediately following work. All tests are to be conducted within thirty minutes of selection, with allowance for travel time to the collection location. When urine is to be collected, the employee may use a private bathroom stall. A monitor inspects the sample for proper color and temperature and then bottles and labels the sample for shipping.

A firefighter who refuses to submit to a test is terminated from employment. A firefighter whose breath test reveals an alcohol concentration of 0.04 or higher or whose urine sample is "positive" for any of several specified drugs is removed from duty and evaluated by a substance abuse professional. Any firefighter who tests positive a second time is terminated from employment. Information in a firefighter's drug testing records is not released outside the department unless the firefighter consents.

B. Article 2, Section 8 of the Arizona Constitution

We first address whether the trial court correctly found that Article 2, Section 8 provides greater protection for privacy rights than the Fourth Amendment in the context of drug testing. In three criminal cases involving warrantless police entry of a home, our supreme court has interpreted the words of Article 2, Section 8, "[n]o person shall be disturbed in his

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[4] Firefighters must also submit to post-accident as well as reasonable suspicion testing and, in certain circumstances, return-to-duty and follow-up testing. Petersen does not challenge these portions of the Policy.

[5] Test samples are screened only for the presence of marijuana and cocaine metabolites, morphine, phencyclidine, amphetamine, codeine, and methamphetamine.

private affairs or his home invaded, without authority of law," to provide an independent state law ground for safeguarding the home and the privacy interests therein against a government search.

In *Ault*, after noting that the Arizona Constitution "generally . . . incorporate[s] federal protections," the court held that Article 2, Section 8 is "specific in preserving the sanctity of homes and in creating a right of privacy." 150 Ariz. at 466, 724 P.2d at 552. Thus, police could not enter a home without a warrant or any exigency, illegally arrest the occupant, and seize evidence in plain view. *Id.* at 464, 466, 724 P.2d at 550, 552. The court also observed that the inevitable discovery doctrine had been limited to searches of a car and of a hotel room. *Id.* at 465, 724 P.2d at 551.

Concern that the Fourth Amendment might not bar a warrantless entry for police to "secure" and inspect a home while awaiting a warrant led the court, in *State v. Bolt*, to clarify that "[s]uch entries are 'per se unlawful' under our state constitution." 142 Ariz. 260, 264-65, 689 P.2d 519, 523-24 (1984) (quoting *State v. Cook*, 115 Ariz. 188, 194, 564 P.2d 877, 883 (1977)). But, the court rejected as "poor judicial policy" adoption of inconsistent state and federal exclusionary rules and held that the state rule would mirror that of the federal courts. *Id.* at 269, 689 P.2d at 528.

Finally, in *State v. Martin*, police entered a home and conducted a "sweep" without a warrant. 139 Ariz. 466, 470, 679 P.2d 489, 493 (1984). The court cited the Fourth Amendment's chief purpose, to guard against intrusion of the home and the associated privacy rights of the occupant, *id.* at 473, 679 P.2d at 496, to hold that under either the federal or state Constitution, the entry was illegal. *Id.* at 474, 679 P.2d at 497.

Thus, despite suggestions that Article 2, Section 8 may exceed the scope of the Fourth Amendment, in general our

courts have found Arizona's Constitutional protection of privacy to be consistent or coextensive with that of the Fourth Amendment. *See, e.g., Mazen v. Seidel*, 189 Ariz. 195, 199, 940 P.2d 923, 927 (1997) (holding warrantless entry of rented storage unit by police and their seizure of contraband after firefighters' valid initial entry is permitted by both Arizona Constitution and Fourth Amendment); *State v. Krantz*, 174 Ariz. 211, 215, 848 P.2d 296, 300 (App.1992) (finding Article 2, Section 8 does not exceed Fourth Amendment and does not forbid warrantless taking of blood to test its alcohol content); *State v. Allgood*, 171 Ariz. 522, 523-24, 831 P.2d 1290, 1291-92 (App.1992) (noting that more expansive reading of Arizona's Constitution is "generally not applied beyond the home" and that police interception of confrontation call violated neither federal nor state constitutions); *State v. Wedding*, 171 Ariz. 399, 407, 831 P.2d 398, 406 (App.1992) (distinguishing Bolt, Ault, and Martin as concerned with warrantless entry of a home); *State v. Calabrese*, 157 Ariz. 189, 190- 91, 755 P.2d 1177, 1178-79 (App.1988) (declining to narrow, on Arizona constitutional grounds, right of police to seize evidence found during warrantless search incident to lawful arrest).

While our courts have vigorously guarded the sanctity of the home from warrantless intrusions by law enforcement officers,, nothing in the cited cases or in the text of Article 2, Section 8 persuades us that the latter provides more protection than the Fourth Amendment when the government conducts a search of a firefighter's urine for the presence of illegal drugs. *See Bolt*, 142 Ariz. at 264, 689 P.2d at 523 (recognizing need for uniformity between federal and state courts and that our constitution generally incorporates federal protections); *State v. Pelosi*, 68 Ariz. 51, 57, 199 P.2d 125, 129 (1948), overruled in part on other grounds, *Adams v. Bolin*, 74 Ariz. 269, 275, 247 P.2d 617, 621 (1952) (Article 2, Section 8's purpose is to preserve Fourth Amendment rights); *Malmin v. State*, 30 Ariz. 258, 261, 246 P. 548, 549 (1926)

(although its language may differ from Fourth Amendment, Article 2, Section 8 has "same general effect and purpose" and will be similarly interpreted).

Accordingly, we hold that in the context of the City's drug and alcohol testing program, the bounds of Article 2, Section 8 do not exceed those of the Fourth Amendment. We now turn to whether the random aspect of the testing is an unreasonable search prohibited by the Fourth Amendment and by the coextensive reach of the Arizona Constitution.

C. Validity of Random, Suspicionless Drug Testing

At the outset, we note that although the United States Supreme Court has approved employee drug testing in some contexts, it has not yet addressed random drug testing of firefighters. Therefore, we begin with a brief overview of the Court's general analysis of drug testing programs. Government-compelled collection and testing of urine for evidence of illegal drug use is a search subject to the Fourth Amendment. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (allowing random drug testing of high school athletes); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 617, 633, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (upholding drug and alcohol testing of railroad employees after accidents or violations of safety rules). To determine whether a government search is reasonable, the Court has balanced the degree of the intrusion on individual privacy against the extent to which the intrusion promotes legitimate governmental interests. *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402. The precise contours of the Fourth Amendment protection, of course, turn on the facts and may vary depending on whether the search invades expectations of privacy in a home, a vehicle, the workplace, a public school, or a park. *See Vernonia*, 515 U.S. at 654, 115 S.Ct. 2386.

Generally, a government search for evidence of criminal conduct is reasonable if a neutral magistrate first determines that probable cause exists to believe described evidence may be found in the place to be searched. *See, e.g., Payton v. New York*, 445 U.S. 573, 586 n. 24, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Ault*, 150 Ariz. at 466-67, 724 P.2d at 552-53. But, neither a search warrant nor probable cause are necessary if " 'special needs,' " beyond law enforcement's normal concerns with crime detection, render the warrant or probable cause requirement "impracticable." *Vernonia*, 515 U.S. at 653, 115 S.Ct. 2386 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987) (approving warrantless search of a probationer's home)).

For example, in Skinner, the railroads had a special need, in order to prevent drug or alcohol-related accidents, to ban workers' use of alcohol or drugs and to test their blood or urine to assure the ban's effectiveness. 489 U.S. at 620-21, 109 S.Ct. 1402. Because the authorizing regulations identified the circumstances justifying the testing and the conditions under which it occurred, "there [were] virtually no facts for a neutral magistrate to evaluate." *Id.* at 622, 109 S.Ct. 1402. More importantly, when delay to seek a warrant would seriously impede the collection of critical evidence, the balance tipped in favor of finding a warrantless intrusion reasonable. *Id.* at 623-24, 109 S.Ct. 1402.

The testing in *Skinner* was not random, but it was also not based on individualized suspicion. *Id.* at 624, 109 S.Ct. 1402. The Court nevertheless concluded that by working in a highly regulated industry, the employees had diminished expectations of privacy, *id.* at 627, 109 S.Ct. 1402, and that the interest in testing was "compelling," in part because of the difficulty in detecting in any other way employees who were impaired while at work. *Id.* at 628-29, 109 S.Ct. 1402.

The Supreme Court similarly found a special need to exist when the United States Customs Service adopted a drug

testing program for employees who sought a transfer or promotion to positions that were directly involved in drug interdiction or law enforcement or that required the employee to carry a firearm or to handle classified material. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 660-61, 666, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989).[6] The program's aim was to deter drug use among those seeking promotion and to bar drug users from being promoted to such positions, thus serving governmental interests apart from those of law enforcement. *Id.* at 666, 109 S.Ct. 1384. As in *Skinner*, no special facts demanded a magistrate's evaluation: testing was automatic and anticipated by applicants for the specified positions, and requiring a warrant would deflect valuable resources from the agency's primary mission. *Id.* at 666-67, 109 S.Ct. 1402.

Additionally, the Court found that traditional ideas of probable cause "may be unhelpful in analyzing the reasonableness of routine administrative functions, especially where the Government seeks to prevent . . . hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person." *Id.* at 668, 109 S.Ct. 1402 (citations omitted). The strong interest in ensuring the integrity, judgment, and fitness of employees who were directly involved in drug interdiction or were going to be armed, and in protecting the public from impaired employees, *id.* at 670-71, 109 S.Ct. 1402, outweighed the privacy interests of those subject to testing. *Id.* at 672, 109 S.Ct. 1402. "Because successful performance

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[6] Compare *Chandler v. Miller*, 520 U.S. 305, 318-22, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997), in which the Court held that no special need supported state-mandated, suspicionless drug testing of candidates for state offices. No drug problem existed among officials; public scrutiny could as effectively detect and deter illicit drug use; and most officials did not perform "high risk, safety sensitive tasks"; thus, the special need was largely symbolic rather than real.

of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness." *Id.*

In the instant case, Petersen and our dissenting colleague strenuously contend that neither *Skinner* nor *Von Raab* approved random testing and that the City cannot institute a drug and alcohol testing program unless it is founded on individualized suspicion and a history of drug or alcohol abuse in the workplace. *Von Raab* clearly held, however, that when the Government's purpose is to discover or prevent from arising hidden conditions that create safety concerns, such as employees' impairment by drugs or alcohol while at work, its purpose may justify searches "without any measure of individualized suspicion." *Id.* at 668, 109 S.Ct. 1384 (emphasis added). The "compelling interest" in avoiding the public harm from impaired employees, *id.* at 670-71, 109 S.Ct. 1384, particularly in light of the "special, and obvious, physical and ethical demands" on those employees, *id.* at 679, 109 S.Ct. 1384, outweighed the intrusion on the employees' privacy, even if no drug abuse problem had prompted the testing program. *Id.* at 660, 109 S.Ct. 1384.

More recently, and again in the absence of a serious drug problem, the Supreme Court upheld drug testing of middle and high school students who participated in extracurricular activities. *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822,—, 122 S.Ct. 2559, 2562-63, 153 L.Ed.2d 735 (2002). The school district's testing policy allowed both random testing and testing based on reasonable suspicion "at any time." *Id.* at—, 122 S.Ct. at 2563.

The students challenging the policy argued that testing should at least require a minimal level of individualized suspicion, but the Court cited *Von Raab* and *Skinner* to reach a contrary conclusion. *Id.* at—, 122 S.Ct. at 2564. As in both of those cases, the Court cited the compelling need to

detect " 'latent or hidden conditions, or to prevent their development,' " so that searches could take place without any indicia of individualized *284 **315 suspicion or probable cause. *Id.* (quoting *Von Raab*, 489 U.S. at 668, 109 S.Ct. 1384).

In evaluating the degree of intrusion on privacy, the students' privacy interests were deemed diminished, as were the interests of workers in closely regulated industries, by the public school district's custodial role and by the students' compliance with additional rules governing participation in extracurricular activities. *Id.* at—, 122 S.Ct. at 2565-66. Also, the character of the intrusion was termed negligible because students could produce a urine sample in a closed bathroom stall while a faculty monitor waited outside, and despite claims that test results were not carefully guarded, the school did not either give results to police or use results to impose discipline. *Id.* at—, 122 S.Ct. at 2566-67. Similarly, in *Vernonia*, 515 U.S. at 658, 115 S.Ct. 2386, the Court found the privacy invasion minor because the students giving urine samples, who remained fully clothed and not subject to direct observation by the monitor, encountered conditions much like those in public restrooms. The samples were tested only for specified drugs and did not reveal any other information; test results were disclosed to a limited group of persons and were not given to police.

On the other side of the scale, the Court accepted as well-known the health and safety risks of drug use and added that "it would make little sense" to require that a problem be allowed to develop before the school district could seek to prevent it. *Id.* at—, 122 S.Ct. at 2568. *See also Von Raab*, 489 U.S. at 675 n. 3, 109 S.Ct. 1384 (when government aims to deter "highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the [testing] scheme . . . , is more logically viewed as a hallmark of success"). The Court also noted that some teachers had

reported seeing students who appeared to be under the influence of drugs at school. *Id.* at—, 122 S.Ct. at 2567. It concluded that in light of a "nationwide epidemic of drug use," neither "a particularized or pervasive drug problem," *id.* at—, 122 S.Ct. at 2568 (emphasis added), nor individualized suspicion was necessary to support random drug testing.

In fact, the Court warned that requiring individualized suspicion might have unintended consequences such as targeting unpopular groups or causing the district, out of fear of litigation over whether the suspicion was justified in a particular case, to less vigorously enforce the testing and so lose its benefits. *Id.* 2559 at—, 122 S.Ct. at 2568-69. The Court further held that, "[i]n any case, this Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means." *Id.* at—, 122 S.Ct. at 2569 (emphasis added). The testing was "a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use." *Id.*

The four dissenting justices in Earls objected not to the lack of individualized suspicion so much as to the perversity of testing arguably those "least likely to be at risk from illicit drugs." *Id.* at—, 122 S.Ct. at 2572 (Ginsburg, J., dissenting). The dissent also contended that the balance of the school district's interests against the students' privacy interests was improperly struck when the nature of student participation in choir, band, or academic team, as contrasted with participation in athletics, did not necessarily reduce the students' privacy expectations, and no documented drug problem bolstered the need for testing. *Id.* at—, 122 S.Ct. at 2574-75. Justice Ginsburg distinguished *Skinner* and *Von Raab* because testing in those cases sought to avoid enormous health and safety risks to others; she distinguished *Vernonia* because physical exertion by drug-using athletes created serious risk

of injury to the athletes and to other players. *Id.* at—, 122 S.Ct. at 2575-76.

Here, as in *Skinner* and *Von Raab*, the testing is imposed on individuals who have substantially reduced expectations of privacy because they work in a highly regulated occupation, and if impaired, place themselves, co-workers, and the public at grave risk. Thus, we disagree with the dissent's suggestion that firefighters' rights to privacy are only slightly diminished compared to those of other adults. Moreover, we see little ground to distinguish approval of a school district's random drug testing to detect and deter illegal drug use by student athletes *(Vernonia)* or by students engaged in after school activities (Earls) from the City's random drug testing of firefighters to detect and deter illegal drug use.

The dissent characterizes the City's interest in testing its firefighters as merely "symbolic" and suggests without elaboration that the risks to public safety that the City seeks to avoid through its testing program are not "substantial and real." The dissent notes that employees in a number of other positions identified as "safety sensitive" are subject to testing. However, testing of firefighters is the sole issue here, and our colleague seriously underestimates the rigorous nature of firefighters' duties and the potential harm that impaired firefighters might inflict. Thus, we do not doubt that the City's interest in ensuring that its firefighters are in optimum condition is compelling. Firefighters must be mentally alert at all times in order to instantly respond to a crisis and grasp and follow orders, particularly when a split-second decision or error in judgment may prove fatal; they also must be physically fit in order to perform under the extremely demanding and dangerous conditions that jeopardize their own lives, the lives of their co-workers, and the lives and property of the public. Furthermore, even off-duty drug or alcohol consumption may imperil safety interests if firefighters can be recalled to duty in an emergency. Given the

daunting responsibilities they must shoulder on a moment's notice, firefighters expect, and necessarily accede to, more governmental regulation than most workers. Because the trust placed in them is so great, the need to detect a firefighter who is impaired at work is equally great.

Additionally, although the firefighters' communal working environment reduces their expectations of privacy and engenders camaraderie and a certain esprit de corps, that camaraderie may make testing dependent on individualized suspicion less effective or less likely to occur. As Justice Breyer reiterated in his concurring opinion in Earls, testing based on individualized suspicion, while seemingly more reasonable, might instead result in use of "subjective criteria" to identify who will be tested or in stigmatizing those actually selected. 536 U.S. at—, 122 S.Ct. at 2571 (Breyer, J., concurring). In *Vernonia*, the Court noted that the athletes' parents found random testing less objectionable than suspicion-based testing because the latter "transform[ed] the process into a badge of shame." 515 U.S. at 663, 115 S.Ct. 2386.

Other courts faced with constitutional challenges to drug testing programs have upheld random and/or suspicionless testing of firefighters and those who occupy safety-sensitive positions. In *Doe v. City and County of Honolulu*, 8 Haw.App. 571, 816 P.2d 306, 310-11 (1991), for example, a firefighter challenged a suspicionless drug testing program. After citing *Harmon v. Thornburgh*, 878 F.2d 484, 489 (D.C.Cir.1989),[7] the court stated that random testing should not be analyzed differently than the pre-transfer or pre-promotion testing in *Von Raab* or the post-accident testing in *Skinner*. *Id.* at 314. The court considered the public safety as

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[7] In *Harmon*, the court found no constitutional violation in random testing of government employees holding top secret national security clearances. 878 F.2d at 496.

well as the firefighters' "health, safety and job performance" to find that testing served a special need. *Id.* It also found the firefighters' privacy expectations diminished by the giving of blood and urine during annual physicals, by regulation of their off-duty conduct, and by their need for strength, stamina, judgment, and alertness on the job. *Id.* at 314-15. The court finally rejected a claim that less intrusive means could detect drug use or impairment, citing *Skinner*, 489 U.S. at 629 n. 9, 109 S.Ct. 1402 (possibility of a less intrusive means of conducting a search is not the touchstone) and concluded that a compelling interest in safety outweighed the minimal intrusion on privacy. *Id.* at 316.

Many federal and state courts have similarly found employee drug testing programs constitutional. *See Hatley v. Dep't of the Navy*, 164 F.3d 602, 603-04 (Fed.Cir.1998) (random drug testing of firefighter working on military base); *Aubrey v. Sch. Bd. of Lafayette Parish*, 148 F.3d 559, 563-65 (5th Cir.1998)(suspicionless and random testing of school custodians when no general drug problem existed); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 384 (6th Cir.1998) (suspicionless but not random drug testing of teaching applicants without any documented workplace drug problem); *Wilcher v. City of Wilmington*, 139 F.3d 366, 373- 78 (3rd Cir.1998) (random drug testing of firefighters that required direct supervision of urine collection); *Saavedra v. Albuquerque*, 73 F.3d 1525, 1532 (10th Cir.1996) (reasonable suspicion-based testing of City's firefighters); *Bluestein v. Skinner*, 908 F.2d 451, 456-57 (9th Cir.1990) (random nature of testing of airline personnel is relevant to reasonableness of program but also may be more effective deterrent and does not render testing unreasonable); *Nat'l Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603, 610-13 (D.C.Cir.1989) (suspicionless random testing of civilians employed by military in aviation and police functions); *Policemen's Benev. Ass'n of New Jersey v. Washington Township*, 850 F.2d 133, 141 (3rd Cir.1988) (suspicionless

random drug testing of police officers); *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562, 566-67 (8th Cir.1988) (suspicionless random testing of nuclear power plant engineers). But *see Anchorage Police Dep't*, 24 P.3d at 557-58 (relying on state constitution to approve post-accident or event-related testing of police officers but finding random testing creates " 'fear and surprise' " and that, without extant drug problem, privacy interests outweigh government's less immediate need); *Guiney v. Police Comm'r of Boston*, 411 Mass. 328, 582 N.E.2d 523, 525-26 (1991) (relying on state law to strike down random drug testing of police officers because no drug problem existed); *Beattie v. City of St. Petersburg Beach*, 733 F.Supp. 1455, 1458-59 (M.D.Fla. 1990) (city's safety interest not sufficiently compelling to test all firefighters for drug use, without any individualized suspicion, during annual physicals when no drug problem had been documented).

If firefighters must be ever-vigilant, we think the City can be no less vigilant in detecting impaired firefighters and removing them from the workforce. Therefore, we conclude that the City's interests are sufficiently compelling to permit random testing.

CONCLUSION

After balancing Petersen's reduced expectations of privacy against the City's compelling need to discover specific but hidden conditions representing grave risks to the health and safety of the firefighters and the public, we hold that the random testing component of the Policy is reasonable under both Article 2, Section 8 of the Arizona Constitution and the Fourth Amendment of the United States Constitution. We reverse the trial court's grant of summary judgment, vacate the injunction, and remand for entry of summary judgment for the City.

CONCURRING: *JOHN C. GEMMILL*, Judge.

HALL, Judge, concurring in part and dissenting in part.

I agree with my colleagues that the Arizona Constitution affords no greater protection against drug testing than does the Fourth Amendment. *State v. Juarez*, 203 Ariz. 441, 444, ¶ 14, 55 P.3d 784, 787 (App.2002). Thus, I concur in section B of the majority opinion. I believe, however, that the City's public safety interest in requiring firefighters to submit to random, unannounced, and suspicionless drug testing does not outweigh Petersen's Fourth Amendment "right to be let alone--the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). Therefore, I respectfully dissent from the majority's holding that the City-compelled collection and testing of urine and breath is constitutionally reasonable.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Amendment safeguards the privacy, dignity, and security of persons against certain arbitrary and invasive acts by state officers, *Skinner*, 489 U.S. at 613-14, 109 S.Ct. 1402, even when the government is acting in its capacity as an employer, *O'Connor v. Ortega*, 480 U.S. 709, 717, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (plurality opinion). *See* also *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) ("The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.").

Because state-compelled collection and testing of urine "intrudes upon expectations of privacy that society has long recognized as reasonable," *Skinner*, 489 U.S. at 617-18, 109

S.Ct. 1402, such intrusions are "searches" under the Fourth Amendment:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

Id. (quoting *Nat'l Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir.1987), aff'd in part, vacated in part, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989)).[8] Not all governmental searches are proscribed by the Fourth Amendment, only those that are unreasonable. *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402. Reasonableness "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Id.* (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985)).

The reasonableness of a particular search is determined, as my colleagues correctly state, by "balanc[ing] the degree of the intrusion on individual privacy against the extent to which the intrusion promotes legitimate governmental interests." Ante ¶ 15 (citing *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402). Although the majority states the standard accurately, it then misapplies the standard by according too little significance to the degree to which random, unannounced, and suspicionless drug testing infringes on a person's bodily integrity and human dignity and by characterizing the Policy as meeting a "compelling" safety need in the complete absence of any facts demonstrating any actual problem that would justify

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[8] Likewise, subjecting a person to the compelled production of alveolar or "deep lung" breath "implicates [ ] concerns about bodily integrity" and is deemed a search. *Skinner*, 489 U.S. at 617, 109 S.Ct. 1402.

dispensing with the "right of the people to be secure in their persons." U.S. Const. amend. IV.

Skinner does not support the imposition of a random, unannounced, and suspicionless drug-testing regimen for firefighters. First, as acknowledged by the majority, the testing at issue in *Skinner* was not random. Instead, a railroad employee, in the absence of any individualized suspicion, could only be tested if the employee was involved in a "triggering event" such as a train accident or incident, or a safety-rule violation. 489 U.S. at 609-11, 109 S.Ct. 1402. Second, the government's interest in combating the documented incidence of drug and alcohol use by railroad employees presented "special needs" that overrode the right of a citizen to be protected against arbitrary governmental intrusions on his or her privacy and justified dispensing with the warrant requirement or need for individualized suspicion. *Id.* at 620, 109 S.Ct. 1402. The Court believed that a warrant, which assures a citizen subject to its reach that any intrusion on privacy is "narrowly limited in its objective and scope," was unnecessary because "the circumstances justifying toxicological testing and the permissible limits of such intrusions [were] defined narrowly" in the policy. *Id.* at 622, 109 S.Ct. 1402. Further, "the delay necessary to procure a warrant [might] result in the destruction of valuable evidence" pertaining to an accident, incident, or rule violation. *Id.* at 622-23, 109 S.Ct. 1402.[9]

In contrast, the City's Policy, which compels firefighters to submit to random testing without advance notice, requires no

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[9] Justice O'Connor, who joined in the opinion, later described *Skinner* as being based "on the firm understanding that a requirement of individualized suspicion for testing train operators for drug or alcohol impairment following serious train accidents would be unworkable because 'the scene of a serious rail accident is chaotic.' " *Vernonia*, 515 U.S. at 674-75, 115 S.Ct. 2386 (O'Connor, J., dissenting) (quoting *Skinner*, 489 U.S. at 631, 109 S.Ct. 1402).

" justifying" triggering event. Although the City's goals of both discerning and deterring drug use are laudable, it can hardly be claimed that these ends justify the means of dispensing with the warrant requirement or the need for reasonable suspicion in the absence of any triggering event, the immediacy of which in *Skinner* made it constitutionally "reasonable" to conduct drug testing without a warrant or reasonable suspicion that the particular employee was impaired. *Id.* at 631, 109 S.Ct. 1402.

Likewise, *Von Raab* provides only limited support for the majority's conclusion that the Policy will not violate the Fourth Amendment's reasonableness requirement. As in *Skinner*, the drug tests performed on Customs employees in *Von Raab* were not random. Instead, only employees that had been accepted for promotion or transfer to one of three categories of covered positions were tested.[10] *Von Raab*, 489 U.S. at 672 n. 2, 109 S.Ct. 1384. The Court identified several factors that it believed were sufficiently compelling to justify conducting suspicionless testing of employees who applied for promotion to positions directly involving the interdiction of illegal drugs or requiring the incumbent to carry a firearm:[11] (1) "[t]he Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population[,]" i.e., the "smuggling of illicit narcotics[,]" (2) the exposure of Customs employees to drug traffickers and the controlled substances they seek to smuggle into the country create corresponding problems involving the safety and integrity of the employees, (3) the irreparable damage to the "national interest in self-protection"

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[10] The covered positions were those that met one or more of three criteria: (1) direct involvement in drug interdiction or enforcement of related laws, (2) carrying a firearm, and (3) handling classified material. *Von Raab*, 489 U.S. at 660-61, 678, 109 S.Ct. 1384.

[11] The Court remanded the case to determine whether the third category was reasonably limited in scope. *Id.* at 678, 109 S.Ct. 1384.

if drug users were not barred from positions involving the interdiction of illegal drugs, and (4) the public interest "demands effective measures to prevent the promotion of drug users to positions that require the incumbent to carry a firearm[.]" *Id.* at 668- 70, 109 S.Ct. 1384 (internal quotations omitted). In concluding that the government's compelling interest in waging the drug war and safeguarding our borders outweighed the privacy interests of the affected Customs employees, the Court emphasized that the requirement that employees be notified in advance of the scheduled sample collection reduced to a minimum any "unsettling show of authority" that may be associated with an unannounced intrusion on privacy, *id.* at 672 n. 2, 109 S.Ct. 1384 (quoting *Delaware v. Prouse*, 440 U.S. 648, 657, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)), and "contribute[d] significantly to diminish the program's intrusion on privacy[,]" *id.* at 676 n. 4, 109 S.Ct. 1384.

In comparison, the City's Policy, which requires all firefighters to submit to random and unannounced testing, is both broader and more intrusive than the drug-screening program upheld in *Von Raab*. The majority's interpretation of *Von Raab*, ante ¶ 21, as "justify[ing] searches *'without any measure of individualized suspicion'* "whenever the government's purpose is to discover or deter drug use by employees, effectively enables the City to bootstrap its desire to combat a nonexistent drug problem into a "compelling" justification that trumps the legitimate privacy rights of its employees. *Compare Beattie*, 733 F.Supp. at 1458 (holding that drug testing of firefighters unjustified "[w]ithout some form of individualized suspicion or some compelling reason beyond a hypothetical future problem"). As stated in *Skinner*, the requirement of individualized suspicion may be jettisoned only in limited circumstances:

> [W]here the privacy interests implicated by the search are minimal, and where an important governmental

> interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.

489 U.S. at 624, 109 S.Ct. 1402. More recently, in *Chandler v. Miller*, 520 U.S. 305, 309, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997), the Court characterized the narrow exception from the usual individualized suspicion requirement as a "closely guarded category of constitutionally permissible suspicionless searches."

Unlike the majority, I do not believe the City's symbolic need to portray its employees as being drug-free is the type of "special need" that justifies dispensing with traditional Fourth Amendment safeguards. Even if the special-needs exception presents as low of a hurdle as the City apparently believes,[12] the blanket suspicionless searches at issue here are not reasonable means to protect society in the absence of any showing that public safety is actually in jeopardy. The majority's observation that firefighters, "if impaired, place themselves, co-workers, and the public at grave risk[,]" *ante* ¶ 28, while accurate, is equally true of anyone who operates a motor vehicle on a public roadway while under the influence of intoxicants.

The majority also relies on the United States Supreme Court decisions in *Vernonia* and *Earls*, both of which addressed the constitutionality of suspicionless drug testing of students in public schools. Neither of these cases substantially supports the constitutionality of the City's Policy. In *Vernonia*, the Supreme Court upheld a school district's suspicionless drug testing of student athletes. 515 U.S. at 665, 115 S.Ct. 2386. In *Earls*, the Court, relying on *Vernonia*,

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[12] Among the positions identified by the City as safety-sensitive in the Policy are meter reader, paint striper, tire service worker, and customer service representative.

upheld a drug-testing policy that required all students who participated in any extracurricular activity to submit to drug testing. 536 U.S. at —, 122 S.Ct. at 2562. In both cases, the Court repeatedly emphasized the unique nature of the public school environment, where the Fourth Amendment is interpreted more leniently with respect to searches. *Earls*, 536 U.S. at—, 122 S.Ct. at 2565 ("Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children.") (quoting *Vernonia*, 515 U.S. at 656, 115 S.Ct. 2386); *id.* ("Central . . . is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.") (quoting Vernonia, 515 U.S. at 654, 115 S.Ct. 2386); *id.* ("[W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.") (quoting *Vernonia*, 515 U.S. at 665, 115 S.Ct. 2386). Obviously, unlike a public school student, a firefighter's right to privacy, although limited in some respects, is not inherently "subject[ ] to greater controls than those appropriate for adults." *Id.*

Unlike my colleagues, I have little trouble distinguishing the mandatory drug testing of students involved in extra-curricular activities from the drug testing of firefighters pursuant to the Policy. The school districts in both *Vernonia* and *Earls* adopted their testing regimes in the face of a documented drug problem within their districts and against the background of a nationwide drug epidemic afflicting our children that "makes the war against drugs a pressing concern in every school." Earls, 536 U.S. at—, 122 S.Ct. at 2567. Further, even though a history of pervasive drug use is not a prerequisite for the institution of suspicionless drug testing, such evidence, which is lacking here, "shore[s] up" the need for a government drug-testing program. *Id.* at—, 122 S.Ct. at 2567-68 (quoting Chandler, 520 U.S. at 319, 117 S.Ct. 1295).

The majority's reliance on *Earls* is particularly problematic given that Justice Breyer, who joined in the 5-4 decision, wrote a separate concurrence emphasizing his reliance on the nondisciplinary nature of the testing program, which "preserves an option for a conscientious objector. He can refuse testing while paying a price (nonparticipation) that is serious, but less severe than expulsion from the school." *Id.* at—, 122 S.Ct. at 2571. In contrast, pursuant to the City's Policy, a firefighter who refuses to provide a urine sample on demand is automatically terminated.[13]

Instead, I find persuasive the analysis in Anchorage Police Department, which involved an almost identical testing program to the one at issue here. In that case, the Supreme Court of Alaska held that the portion of the municipality's substance abuse testing policy that required police and fire department employees to submit to random and unannounced testing violated the Alaska Constitution. 24 P.3d at 558. Applying the special-needs balancing test as articulated by

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[13] Other cases cited by the majority are distinguishable because they: (1) do not address random drug testing, *e.g., Wilcher*, 139 F.3d at 374 (firefighters consented to random drug testing in bargaining agreement with city); *Saavedra*, 73 F.3d at 1532 (testing of firefighters based on reasonable suspicion); Doe, 816 P.2d at 310 (urine routinely collected from firefighters and tested as part of their annual physical); (2) fail to conduct a careful analysis of the competing private and public interests, *e.g., Hatley*, 164 F.3d at 604 (summarily upholding random drug testing of firefighters); (3) interpret Supreme Court precedent in this area in a more limited manner than does the majority, *e.g., Harmon*, 878 F.2d at 490 *("Von Raab* [ ] suggests that the government may search its employees only when a clear, direct nexus exists between the nature of the employee's duty and the nature of the feared violation."); or (4) uphold suspicionless searches conducted in response to risks to public safety that are substantial and real, *e.g., Cheney*, 884 F.2d at 610-12 (suspicionless random testing of civilians employed by military in aviation and police functions); *Rushton*, 844 F.2d at 567 (engineers at nuclear power plants); *see also United States v. Edwards*, 498 F.2d 496, 500 (2d Cir.1974) (search of passengers and baggage before boarding commercial airliners).

the United States Supreme Court, the court first upheld the superior court's finding that the municipality's interest in ensuring public safety outweighed the privacy intrusion that occurs when the employees are subjected to suspicionless urine testing for job-related events, such as application for employment, promotion, demotion, transfer, or after a vehicular accident. *Id.* at 556-57. However, the court then concluded that the balance shifted in favor of individual privacy rights in the case of an indefinite requirement of random testing. *Id.* at 557.

In determining that the municipality failed to establish a special need for the random-testing component of its policy, the court cited three considerations. *Id.* First, the municipality's random testing, which the court described as "a continuous and unrelenting government scrutiny that exposes the employee to unannounced testing at virtually any time[,]" placed increased demands on employees' reasonable expectations of privacy. *Id.* at 557-58. Second, unannounced random testing is more intrusive and has a broader reach than testing triggered by predictable, job-related occurrences such as promotion or transfer. *Id.* at 558. Third, because random testing has no nexus to any job-related occurrence, it reduces the immediacy of the government's need for suspicionless testing:

> [I]n the absence of a documented history of substance abuse, then, the Municipality can claim no immediate, job-contextual need to know the results of a randomly drawn urinalysis; it can only claim a more attenuated institutional interest in checking.

Id. These same privacy considerations are magnified in the context of the City's Policy, which requires that any "conscientious objector" be terminated from employment.

In summary, the majority's conclusion that the City's interests are sufficiently compelling to justify imposition of its random, unannounced, and suspicionless drug testing

program is not supported by the relevant United States Supreme Court cases. Moreover, its application of the "special-needs" rationale to dispense with any requirement of particularized suspicion, even though there is no evidence in the record of any past or ongoing drug problem among the City's firefighters, goes too far in eroding the Fourth Amendment protections enjoyed by all citizens. *See Camara*, 387 U.S. at 530, 87 S.Ct. 1727 ("It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."). Instead, I conclude that the City's asserted special need to deter drug abuse, the incidence of which is hypothetical, does not outweigh Petersen's right to be let alone absent individualized suspicion. Therefore, I would uphold the trial court's grant of summary judgment and affirm its order enjoining the City from implementing the random, suspicionless part of its Policy.

APPENDIX C

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

[Filed 11–01–2001]

CV 2001-0902.8

CRAIG W. PETERSEN

v.

CITY OF MESA

MINUTE ENTRY

HONORABLE ROBERT D. MYERS

This matter has been under advisement.

Plaintiff is a firefighter employed by the City of Mesa Fire Department. Plaintiff has filed a complaint for declaratory and injunctive relief, alleging that the random, suspicionless drug and alcohol testing provisions of the City of Mesa Fire Department's proposed Alcohol and Controlled Substance Testing Policy and Procedures ("Policy") would violate his rights under the United States and Arizona Constitutions.[1] Specifically, Plaintiff has requested that the Court declare that drug and alcohol testing without a warrant based upon probable cause, or without reasonable suspicion, that Plaintiff

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[1] Plaintiff has not challenged the provisions of the Policy that provide for drug and alcohol testing based upon reasonable suspicion, following an accident, following a return to duty or as a follow-up component after a previous misuse of alcohol or a controlled substance.

has engaged in the use of illegal drugs or violated the City's policy regarding use of alcohol violates:

> 1. Plaintiff's privacy rights as guaranteed by Article II, Section 8 of the Arizona Constitution;
>
> 2. Plaintiff's right to be free from unreasonable searches and seizures as guaranteed by Article II, Section 4 of the Arizona Constitution;
>
> 3. Plaintiff's right to be free from unreasonable searches and seizures as guaranteed by Article II, Section 4 of the Arizona Constitution;
>
> 4, Plaintiff's privacy rights as guaranteed by the United States Constitution;
>
> 5. Plaintiff's procedural and substantive due process rights as guaranteed by the Arizona and United States Constitutions.[2]

Plaintiff has also requested that the Court permanently enjoin the Defendant from testing without a warrant based upon probable cause, or without reasonable suspicion, that Plaintiff has engaged in the use of illegal drugs or violated the City's policy regarding use of alcohol.

The Defendant's answer affirmatively alleged that the position of firefighter is a safety sensitive position, that random drug testing is reasonable under Fourth Amendment, and that Plaintiff had no likelihood of prevailing on the merits, Defendant asked that the Court deny Plaintiff's request for an injunction and dismiss the complaint for failure to state a claim.

Plaintiff subsequently filed an application for a preliminary injunction prohibiting Defendant from implementing the random suspicionless drug and alcohol testing element of the

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[2] Although he has not requested relief on this basis, Plaintiff also alleges that testing without reasonable suspicion violates the Fourth Amendment to the United States Constitution.

Policy until final judgment of the Court is rendered on the Policy's constitutionality.

Defendant has filed a response to Plaintiff's application for a preliminary injunction. The Defendant has moved that the Plaintiff's request for a preliminary injunction be denied and the case be dismissed for failure to state a claim upon which relief can be granted, pursuant to Arizona Rules of Civil Procedure, Rule 12(b).

A motion to dismiss for failure to state a claim admits the truth of facts alleged for purposes of the motion, and argues that a plaintiff is not entitled to relief under any legal theory. *State v. Superior Court of Maricopa County,* 123 Ariz. 324, 329, 599 P.2d 777, 782 (1979). A motion to dismiss for failure to state a claim should be denied unless it appears beyond doubt that no set of facts in support of the claim can be proved that would entitle a plaintiff to relief. *Newman v. Maricopa County*, 167 Ariz. 501, 503, 808 P.2d 1253, 1255 (App. 1991).

Plaintiff and Defendant have filed their responses and replies. In support of its motion to dismiss, Defendant states that the facts are undisputed and that as a matter of law, Plaintiff's arguments are entirely without merit. Defendant has submitted the U.S. Department of Transportation's Controlled Substances and Alcohol Use and Testing regulations as Exhibit 2 to its response to Plaintiff's application for a preliminary injunction. Plaintiff has submitted an unsworn statement, referred to as an affidavit, from a Kent Holtorf, M.D., as Attachment 1 to his response to the motion to dismiss. Oral argument on Defendant's motion was heard on September 28, 2001. The Court will treat this matter as a motion for and response to motion for summary judgment.

Defendant argues that suspicionless and random drug and alcohol testing of employees serving in safety sensitive positions is lawful, and that firefighters by the nature of their

work clearly serve in safety sensitive positions. Defendant states that the Policy's random testing element has as its goal the protection and welfare of the community. To that end, random testing is intended to deter prohibited drug and alcohol use and to remove identified users from the "safety sensitive work force." Defendant relies primarily on two U.S. Supreme Court decisions upholding suspicionless drug and alcohol testing programs for certain public sector employees in safety sensitive positions, *Skinner v. Railway Labor Executives' Assn*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), and a series of federal court decisions following *Skinner* and *Von Raab*.

Plaintiff argues that the Policy violates his right to privacy in that it: 1) mandates an embarrassing and undignified situation; 2) requires the employee to make available highly personal and private information beyond that necessary to test for impairment; 3) subjects employees to false accusations based on false positive tests. Plaintiff contends that Defendant has failed to demonstrate a drug abuse problem in the City of Mesa Fire Department, or any other real or substantial threat to public safety sufficiently compelling to justify the use of random testing. In addition to *Skinner* and *Von Raab*, Plaintiff relies upon *Vernonia School District 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), and *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997), arguing that the latter two decisions limit the reach of *Skinner* and *Von* Raab. Plaintiff also relies upon *Anchorage Police Department Employees Association* v. *Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001), which held that random suspicionless drug and alcohol testing of municipal police and fire fighters violated the Alaska Constitution's privacy and search and seizure provisions.

1. Drug and Alcohol Testing Constitutes a Search and Seizure.

It is clear, and neither party disputes, that urine, blood or other testing of a public employee pursuant to a drug and alcohol testing policy and separate from the government's general interest in law enforcement constitutes a search and seizure. "Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617. "In view of our holding in Railway Labor Executives that urine tests are searches, it follows that the Customs Service's drug-testing program must meet the reasonableness requirement of the Fourth Amendment." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665. Arizona appellate courts have not had occasion to compare the application of either Fourth Amendment or Article 2, § 8 of the Arizona Constitution to government drug and alcohol testing policies. However, in the context of Article 2, 5 8 and the search of a home, the Arizona Supreme Court has stated that Arizona's constitutional provisions were both generally intended to incorporate federal protections and specifically in creating a right of privacy. *State v, Ault*, 150 Ariz. 459, 466, 724 P.2d 545, 552 (1986). The Court of Appeals has held that subjecting the sister of an adjudicated juvenile delinquent to urinalysis testing involved a significant intrusion on her right to be free from unreasonable search and seizure under the Fourth Amendment and Article 2, Section 8. *Katherine S. v. Foreman ex* rel. *County of Maricopa*, 197 Ariz. 371, 379, 4 P,3d 426, 434 (App,1999). The Court of Appeals has also found warrantless administrative searches in the context of a closely regulated business to implicate rights to privacy and freedom from unreasonable search and seizure. *State v. Hone*, 177 Ariz. 213, 866 P.2d 881 (App.1993).

Other state courts that have considered challenges of suspicionless drug and alcohol testing of public employees under their own state constitutional provisions have also found the testing to be an intrusion on employees' privacy and dignity, and to constitute a search and seizure. *Anchorage Police Department Employees Association v. Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001); *Doe v. City of Honolulu*, 8 Haw. App. 571, 816 P.2d 306 (1991) ; *Guiney v. Police Commissioner of Boston,* 411 Mass. 328, 582 N. E. 2d 523 (1991); *Robinson* v. *City of Seattle*, 102 Wash. App. 795, 10 P.3d 452 (Wash. Ct. App. 2000). These courts, whether considering state constitutional privacy or search and seizure provisions, have analyzed the testing in terms of the reasonableness of the warrantless search and seizure.

2. Arizona Constitution, Article 2, § 8.

Arizona courts have held that Article 2, § 8 is broader and more explicit than the Fourth Amendment in safeguarding the fundamental liberty of Arizona citizens. *State v. Ault*, 150 Ariz. 459, 463, 724 P.2d 545, 549 (1986); *State v. Tykwinski*, 170 Ariz. 365, 371, 824 P.2d 761, 767 (App. 1991). While both parties argue generally that some level of balancing of Plaintiff's privacy interests and Defendant's interest in intruding upon his privacy, neither party's pleadings address the requirements of Article 2, § 8. Since Arizona courts have not considered the application of either the Fourth Amendment or Article 2, § 8 to drug and alcohol testing of public employees, and neither party has identified a standard to be applied in this case, the Court must determine the standard to be applied.

Arizona courts have recognized that a warrant, probable cause, or individualized suspicion is not always necessary for a search or seizure to be reasonable. Arizona courts have permitted warrantless administrative searches in the context of a closely regulated business where there was a substantial government interest in the regulatory scheme pursuant to

which the inspection was made, and where privacy interests were therefore lessened; the warrantless inspections were necessary to further the regulatory scheme; and the regulatory scheme had a properly defined scope and limited the discretion of the inspecting officers. *State v. Hone*, 177 Ariz. 213, 215, 866 P.2d 881, 883 (App. 1993).Arizona courts have also upheld warrantless, suspicionless roadblock traffic stops as reasonable under the Fourth Amendment and Article 2, § 8 where the gravity of the public concern for safety and deterrence was compelling, the seizure effectively advanced the public interest and there was no less intrusive alternative, and the severity of the interference with individual liberty was minimal. *State v. Superior Court (Simmons)*, 143 Ariz. 45, 48-49, 691 P.2d 1073, 1076-77 (1984); *see State v. Tykwinski*, 170 Ariz. 365, 824 P.2d 761 (App. 1991).

In *Anchorage Police Department Employees Association v, Municipality of Anchorage,* 24 P.3d 547 (Alaska 2001), the Alaska Supreme Court reviewed a challenge by police and fire fighter employee associations to the Municipality of Anchorage's drug and alcohol testing program, which provided for suspicionless testing, on the grounds that the policy violated the Alaska Constitution. Alaska's Constitution has a both a privacy provision and a search and seizure provision, and thus differs from Arizona's.[3] However, the Anchorage court stated that the two provisions together provide greater protection than the Fourth Amendment, as is true for Arizona cases construing the Arizona Constitution's

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[3] "Article I, section 14, of the Alaska Constitution prohibits unreasonable searches and seizures: 'The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated.' Article I, section 22, defines Alaska's right to privacy; 'The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.'" *Anchorage Police Department Employees Association v. Municipality of Anchorage*, 24 P.3d 547, 550 (Alaska 2001).

privacy provision. The Anchorage court analyzed the issue in search and seizure terms, stating that if the policy satisfied that state constitutional provision, the privacy provision would also be satisfied, and adopted the special needs analysis employed by the U.S. Supreme Court decisions in *Skinner*, *Von Raab*, *Vernonia*, and *Chandler*, *supra*. In adopting a special needs analysis, both Anchorage, as to state court decisions, and *Skinner* and *Von Raab*, as to Supreme Court Fourth Amendment cases, relied in part on precedents balancing privacy interests and government intrusion on such interests in the areas of administrative searches and roadblock traffic stops. Given the prior Arizona decisions in these areas, as specified above, the Court finds the *Anchorage* court's case-by-case special needs balancing analysis persuasive.

The Anchorage Court found that drug and alcohol testing of public employees meets a special government need where employment occurs in a highly regulated, safety-essential field in which employees necessarily expect reduced privacy in job-related activities and implicitly agree to a diminished level of privacy when they accept employment. The Court found that police and fire fighters clearly hold safety-sensitive positions in extensively regulated fields of activity in which they would reasonably expect that their conditions of employment would subject them to exceptionally close scrutiny. Finally, the Court examined the nature of the privacy interest involved, the nature, extent and efficacy of the intrusion, and whether the government's interest was compelling. Under that analysis, the Court found that as to the random, suspicionless component of the municipality's policy, random testing placed greater demands on employees' reasonable expectations of privacy, was qualitatively more intrusive and had a broader reach than testing triggered by predictable, job-related occurrences, and, particularly in the absence of a documented history of substance abuse within the affected departments, had no logical nexus to any job-

related occurrence and thus reduced the immediacy of the government's need for the information disclosed.

Plaintiff has argued that the Defendant's policy mandates an embarrassing and undignified situation, requires the employee to make available highly personal and private information beyond that necessary to test for impairment, and subjects employees to false accusations based on false positive tests. Defendant argues that drug testing has become common in the workplace, citing one law review article, that testing programs for public employees in safety sensitive positions are invariably upheld in the courts, and that fire fighters work in safety sensitive positions in a close, regimented environment; cites the U.S. Department of Transportation's Controlled Substances and Alcohol Use and Testing regulations; and cites A.R.S. § 23-493 *et seq*. as to the state's policy regarding drug testing in the private workplace.

There is no doubt that fire fighters hold safety-sensitive positions in an extensively regulated field of activity. As a result, fire fighters may reasonably expect that the conditions of their employment would subject them to closer scrutiny than would be required of the general government workforce. However, as the Anchorage case makes clear, neither a finding of reduced privacy interest, nor a minimal, narrowly tailored intrusion on such interest, nor a compelling government interest-and therefore the reasonableness of random drug and alcohol testing-naturally and necessarily follow. It is also instructive that the U.S. Supreme Court has upheld random, suspicionless testing under the Fourth Amendment only in the special environment of schools, for student athletes. While other Courts have, under other constitutional provisions and differing factual circumstances, upheld suspicionless testing triggered by predictable job-related occurrences and by random procedures, Courts have also examined whether procedures for testing would be reasonably effective for discovering impairment or whether the tests as performed

were too broad in scope or frequency, or not narrowly tailored so as to constitute an undue invasion of privacy. *Anchorage Police Department Employees Association* v. *Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001) 7 *see Gonzalez v. Metropolitan Transportation Authority*, 174 F.3d 1016 (9th Cir. 1999). Courts have recognized the dangers of false positive test results with testing populations for which no prior history or incidence of drug or alcohol use is shown, or for which any existing drug or alcohol use is low. *Gonzalez v. Metropolitan Transportation Authority*, 174 F.3d 1016, 1023 (9th Cir. 1999). Courts have required a *showing* whether a policy's low threshold (.02) for a positive alcohol test result calls into question the constitutionality of that portion of the test.

Knox County Educ. Assign v. Knox County Bd. of Educ., 158 F.3d 361, 384 (6th Cir. 1998). *Given the* forgoing analysis, the holding in Anchorage, and Defendant's showing, not only *can it* not be said that Plaintiff is without any reasonable prospect of prevailing on the merits of his case, Defendant has failed to sustain its burden of showing a compelling interest for its intrusion on Plaintiff's reasonable expectations of privacy.

The Court finds that there are no material facts at issue, and that the random, suspicionless drug and alcohol testing component of Defendant's Policy violates Article 2, § 8 of the Arizona Constitution. Defendant's motion, treated here as one for summary judgment, is denied. Plaintiff's requested relief that the Court declare that random, suspicionless drug and alcohol testing violates Plaintiff's privacy rights as guaranteed by Article II, Section 8 of the Arizona Constitution is granted. The Court finds that Plaintiff would, as a result, suffer irreparable harm if tested pursuant to the random, suspicionless component of the Policy, and that such harm outweighs any harm to the Defendant. Plaintiff's requested relief that the Court permanently enjoin the

Defendant from enforcing the random, suspicionless component of its Policy is therefore granted. The remainder of the Policy is unaffected by this ruling. The Court has signed this order to give finality to its judgment, for appellate purposes.

Dated this 29th day of October 2001.

/s/ROBERT D. MAYERS
ROBERT D. MYERS
JUDGE OF THE SUPERIOR COURT